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THE WHITE PRIMARY

O. DOUGLAS WEEKS*

It is well known that in the ten states of the American Union which are usually described as Southern the Democratic party is for all practical purposes of state and local politics the only political party, and its nominations for public offices are in effect elections. It is equally well known that in the same states negro citizens in one way or another are effectively prevented from taking any significant part in politics.[1] The sociological and political explanations of these facts have been numerous, if not always fair or adequate, and the devices and means by which "white supremacy" is maintained in the politics of the South have been frequently described. The most effective bar, however, to negro participation—the so-called "white primary"—has received scant consideration. A recent decision of the Supreme Court of the United States in the case of *Grovey v. Townsend*,[2] sustaining the white primary in Texas, has given it a more or less definitive status and has made it a subject of more immediate interest to students both of law and politics.

I. ORIGIN AND HISTORY

The term "white primary" is usually applied to the direct primary elections of the Democratic party in Southern States from which negro voters are barred by a rule either of the state or local party organization. It takes the form of a "declaration by the Democratic party authorities in each State that only white men (are) eligible to membership and permitted to help, in the primary elections, in the nomination of the party candidates."[3] It thus follows that, since nomination by the Democratic party is equivalent to election in state

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[1]Consult: EDWARD M. SAIT, AMERICAN PARTIES AND ELECTIONS (New York, 1927), ch. II; and PAUL LEWINSON, RACE, CLASS, AND PARTY (New York, 1932).

[2]295 U. S. 45 (1935).

[3]LEWINSON, *op. cit., supra.* Note 1, at 111.

and local contests in most cases, debarment from the nominating process is in effect disfranchisement. Denial of the privilege of participating in primaries also means, essentially, ineligibility to party membership in general and excludes the negro from all party proceedings such as mass meetings, conventions, or caucuses of voters in the precinct, and from delegate conventions in larger areas, to say nothing of party offices and candidacies in the party primaries.

It should be noted that exclusion of the negro from party activities did not originate with the state-wide direct primary system, which only by 1915 came to be established by law, either on a mandatory or optional basis, in all Southern states.[4] In fact, Democratic party rule or custom has, with some exceptions as to times and places, barred the negro from party membership and participation in the party councils since Reconstruction days. Whatever might have happened in this respect had the Radical Republicans of this period refrained from organizing the negro politically is a matter of conjecture, but it is certain that from that time until the "agrarian revolt" of the '80's and '90's, negroes usually were not admitted to the "Conservative" or Democratic party organizations. With the rise of the Populists, particularly in the Southwest, negroes were often encouraged to participate in elections and even in party affairs. In some localities they no doubt held the balance of power between the Democrats and the Populists. This led in the end, however, to even greater stress on the maintenance of the Democratic party as a "white man's party" and to the development of a "lily white" attitude among many Republicans.[5] The story is a long and complicated one, as well as one that is instructive for some critics who have not considered all the facts. Indeed, it is not altogether untenable that it may be better for all concerned to exclude the negro from politics than to "use" him for political purposes perhaps even more harmful to him than to others.

The origin of the white primary proper in Southern states is to be found in the local or county party rules of the Democratic party, which were common in the later nineteenth century as a means of excluding the negro from the old-fashioned precinct primary and from the newer type of local direct primary established by county rule for certain counties and known as the "Crawford County System." This system, which transferred the function of nominat-

[4] *Id.* at 111-112.

[5] *Id.* at 51-60, 101-114. In 1924, the Republican candidate for the governorship of Texas repeatedly asserted the doctrine of "white supremacy."

ing candidates for local and county office from delegate conventions to the rank and file of the party membership, was the forerunner of the state-wide direct primary, and had been quite commonly adopted in the South before 1900.[6] A local rule barring negroes from participation in one or the other type of primary was sufficient, since state-wide and district nominations were still largely in the hands of state or district delegate conventions. There were, however, examples of rules adopted by state-wide party authorities. For instance, the Texas State Democratic Executive Committee in 1904 issued a recommendation to the local party organs to the effect that "the party authorities in all primaries permit all white Democrats to participate in said primaries who will be qualified voters under the law at the succeeding general election . . . ."[7]

At first all rules for participation in party affairs were merely party enactments with which the State had no concern. Beginning in 1888, however, statutes were frequently passed by state legislatures for the purpose of regulating party organization and activities.[8] These laws commonly laid down certain requirements for voters' participation in primaries of both the types described above. The Southern laws, after enumerating a number of qualifications, usually added a statement similar to the one placed in the Texas law of 1903 to the effect "that the executive committee of any party for any county may prescribe additional qualifications for voters in such primaries."[9] Thus it was clear that the statutory qualifications were not intended to be exclusive and that an inherent power was recognized as remaining in the party authorities to adopt rules of party membership.

With the enactment of state-wide mandatory or optional direct primary laws,[10] which more or less completely regulated the entire structure and activities of political parties including the laying down of certain requirements for participation in their primaries, the state party authorities were in some states recognized by the law as having residual rule-making power to supplement the statutory qualifications for party membership and for participation in both the state-wide and local primary elections. In short, the statutes, after extending to the primary elections the requirements for participation

[6]See: James H. Booser, *The Origin of the Direct Primary*, National Municipal Review, April 1935, 222-223; and Sait, *op. cit., supra,* at 274-276.
[7]Texas Almanac, (Dallas, 1904) 37.
[8]C. E. Merriam and L. Overacker, Primary Elections (Chicago, 1928), chs. II and III.
[9]General Laws of Texas, 28th Legislature, Regular Session, 1903, ch. 101.
[10]Merriam and Overacker, *op. cit., supra,* ch. V.

in general elections, specifically recognized the right of "all parties" to enact additional rules of eligibility. In other states the law was either silent or did not specify whether such rules were to be made by state or local party authorities. Only one state legislature has ever attempted to place a white primary provision in the primary statutes. In 1923 the Texas Legislature passed an act providing that "in no event shall a negro be eligible to participate in a Democratic party primary election held in the state of Texas, and should a negro vote in a Democratic primary election, such ballot shall be void and election officials are herein directed to throw out such ballot, and not count the same."[11] This provision, it will be seen later, was invalidated by the United States Supreme Court in 1927 in the case of *Nixon v. Herndon.*[12]

II. PRESENT STATUTORY BASIS

By 1930, Democratic white primary rules, enacted either by the state or local party authorities, were in force in at least eleven states.[13] In four of these—Alabama, Florida, Louisiana, and Mississippi—the primary election statutes specifically recognize the state executive committees of political parties as the authorities possessing the power to add to the statutory qualifications for participation in party primaries. The Alabama statute provides that "every State Executive Committee of a party shall have the right, power, and authority to fix and prescribe the political or other qualifications of its members, and shall, in its own way, declare and determine who shall be entitled and qualified to vote in such primary election. . . ."[14] In Florida the statute states that the State Executive Committee "may by resolution declare the terms and conditions on which legal electors shall be declared and taken as proper members of such party. . . ."[15] Louisiana permits "further qualifications pre-

[11]General and Special Laws of Texas, 39th Legislature, 2nd Called Session, 1923, ch. 32.

[12]273 U. S. 536, 71 L. Ed. 759 (1927).

[13]Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. See: LEWINSON, *op. cit., supra,* Appendix III. It should be noted that some of the Southern states with large negro populations, like Alabama and Mississippi, have quite extensive suffrage restrictions which in effect are directed against the negro. These restrictions apply to primaries as well as general elections and are perhaps relied on more than white primary rules as means of barring negroes from Democratic primaries.

[14]General Laws of the Legislature of Alabama, Session of 1931, No. 56, Sec. 11.

[15]Primary Election Laws of the State of Florida, Jan. 1934, Sec. 377. In regard to Florida, Mr. J. B. Hodges, chairman, State Democratic Executive Committee of Florida, states in a letter of October 23, 1935 to the writer that

scribed by the state central committee of the respective political parties . . . ."[16] Mississippi provides that a voter may participate in a party primary if he "is not excluded from such primary by any regulation of the state executive committee of the party holding the primary."[17] The Arkansas statute is silent as to party authority to make rules of membership, but the Democratic State Committee, with the authorization of the State Convention, enacted a white primary rule.[18] Thus in five states a state-wide rule enacted by the state executive committee is in force. In three additional states —South Carolina, Texas, and Virginia—the present white primary rules were established by the Democratic state conventions. The statutes in these states specifically recognize the right of the party to add qualifications, but do not specify the state party convention as the rule-making agency. The South Carolina statute simply states that "except as herein provided, the primary election shall be conducted in accordance with the party rules."[19] A Texas provision recognizes the State Executive Committee as the rule-making authority in matters of party membership,[20] but the present white primary rule was the act of the State Convention of the Democratic party in which body both the supreme courts of Texas and the United States have recognized an "inherent" right to enact such a rule.[21] In Virginia, parties are recognized by the law as having "inherent" rule-making power to lay down "other requirements" for taking part in their primaries.[22] Finally, Georgia forbids participation in all primaries to one "who is not a duly qualified and registered voter . . . . and who is not duly qualified in accordance with the rules and regulations of the party holding the same" and the "party authorities" are named as having a right to make additional require-

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the white primary rule of the Democratic State Executive Committee is based on the authority of a party declaration in a state party platform adopted by the State Convention many years ago to the effect that only white voters may participate in the primary election rather than upon any provision of the primary statutes. He further states that on several occasions, when the rule has been contested in the courts, the above fact has been sufficient to cause the court to uphold the exclusion of negroes from the primary.

[16]General Statutes of the State of Louisiana (Dart), Vol. I, Title XIX, ch. II, sec. 2660.

[17]Mississippi Code of 1930, Vol. II, ch. 149, sec. 5887.

[18]Rules of the Democratic Party in Arkansas, 1934, sec. 2.

[19]Code of Laws of South Carolina, 1932, Vol. II, Title 24, ch. 105, sec. 2399.

[20]Texas Election Laws, 1928, art. 3107.

[21]Bell v. Hill, 74 S. W. (2d) 113 (1934); Grovey v. Townsend, 295 U. S. 45 (1935).

[22]Virginia Election Laws in Effect June 17th, 1930, ch. 15, secs. 227, 228.

ments;[23] the North Carolina law is silent as to any party power to lay down rules of membership, but Democratic county organization rules are general, though not universal. There are county Democratic rules in a majority of Tennessee counties; and Kentucky is alleged to have had Democratic white primary rules in a few counties, but seems to have none now. This marks the extent of the white primary rules; in other border states, sometimes characterized as partly Southern, negroes are allowed full access to Democratic primaries.[24] Stress has been laid at this point on the statutory provisions permitting party authorities to make additional rules in regard to party membership, and on the particular party agencies which are recognized by law as having the right to make such rules, for reasons that will appear more clearly later.

III. DEMOCRATIC WHITE PRIMARY RULES

The white primary rules themselves are usually quite brief. A few examples may be set forth. For instance, the Arkansas rule reads: "The Democratic party of Arkansas shall consist of all eligible and legally qualified white electors, both male and female, who have openly declared their allegiance to the principles and policies of the Democratic party. . . ."[25] In Louisiana the Democratic primary rule states "that no one shall be permitted to vote at said primary except electors of the white race."[26] The Texas rule is worded as follows: "Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the state shall be eligible to membership in the Democratic party and as such entitled to participate in its deliberations."[27] In Virginia, "All white persons who are qualified to vote at the next ensuing general election" and who are otherwise permitted to vote by the Democratic party "are hereby declared to be members of the Democratic party of Virginia."[28] South Carolina has a unique rule. Its primary statute, in the first place, provides that membership in the Democratic party may be acquired only by registering as a member of a township or ward party club, the chief privilege of which membership is that of taking part in the party primaries. The law provides elaborately for

[23] 1922 SUPPLEMENT, PARKS ANNOTATED CODE OF THE STATE OF GEORGIA, 1914, ch. 8, Title II, sec. 138 (g).

[24] LEWINSON, *op. cit., supra,* at 138-143.

[25] Rules of the Democratic Party in Arkansas, 1934, sec. 2.

[26] Mimeographed *Resolution* of the Democratic State Central Committee of Louisiana, adopted October 1, 1935, sent the writer by Mr. A. W. Newlin, Secretary to the Committee.

[27] Quoted in Grovey v. Townsend, 295 U. S. 45 (1935) at 47.

[28] Democratic Party Rules (Virginia), Adopted June 9, 1932, p. 16.

the organization of the clubs,[29] and the State Democratic rules make further provision for the details of their structure and procedure. The State rules then provide that "The qualifications for membership in any club of the party in this State, and for voting at a primary shall be as follows, viz: The applicant for membership, or voter, shall be twenty-one years of age, or shall become so before the succeeding general election and be a white Democrat." It is further provided that "Every negro applying for membership in a Democratic club, or offering to vote in a primary, must produce a written statement of ten reputable white men, who shall swear that they know of their own knowledge that the applicant or voter voted for General Hampton in 1876, and has voted the Democratic ticket continuously since. . . ."[30]

So much for the white primary rules themselves and the authority upon which they rest. A question that arises immediately is: how well or how completely are these rules enforced? It has been seen that county rules may have obtained only in parts of Kentucky, and are in force largely, but not completely, in Tennessee and North Carolina. It has been stated that "In Kentucky it may be that the blackest of Black Belt counties refused to admit Negroes to the Democratic primary."[31] The most recent authoritative information, however, indicates that "There are no county Democratic organizations in Kentucky which have a 'white primary' rule."[32] In Tennessee, another border state, and one in which only local white primary rules obtain, it seems that negroes are admitted to the Democratic primaries in Memphis, and to some extent in Nashville and other cities and towns in the middle and eastern parts of the State. Below the border states, North Carolina, also with only county white primary rules, is the only state in which negroes are admitted to the Democratic primaries in any considerable portion of the state, and here only in a number of western counties. Elsewhere state-wide rules prevail, and, with a few exceptions in certain counties and localities, the white primary is effective. Party splits in Alabama and Texas from 1928 to 1930 let down the bars in some counties.[33] In the primary elections of 1932 and 1934 a number of county or-

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[29]Code of Laws of South Carolina, 1932, Vol. II, Title 24, ch. 105, secs. 2354, 2359.

[30]Rules of the Democratic Party of South Carolina, as amended May 16, 1934, Rules 3, 4, 5, 6, and 7.

[31]Lewinson, *op. cit., supra,* at 153.

[32]Letter of Mr. Keen Johnson, Publicity Director, Democratic Party of Kentucky, to writer, Oct. 12, 1935.

[33]Lewinson, *op. cit., supra,* at 153-154.

ganizations in Texas defied the State Convention rule due to confusion as to the meaning of the United States Supreme Court decision in the case of *Nixon v. Condon.*[34] In a number of white primary states with state-wide rules, there can be no doubt that negroes are admitted occasionally in certain counties because of some local factional fight. Rarely, however, is the state-wide rule habitually disregarded in a given county or locality.

It should be noted, however, that the present degree of uniformity in barring negroes from participation in the proceedings of the Democratic party has been to some extent the result of the prevalence of state-wide rules during the last twenty-five or thirty years. It seems that there has been strict enforcement of the white primary in Arkansas only since 1924. In Texas, where there has been a state-wide regulation only since 1923, it was formerly true that there were three types of counties with reference to white primary rules: "those which barred negroes by county rule; those in which the negro population was negligible and no county rule was passed, possibly from oversight; and lastly those which intentionally overlooked issuing a ruling barring negroes from participation."[35] Earlier difficulties in the latter counties produced in certain Southeast Texas counties what were known as "the white men's union associations." The purpose of these organizations was to keep the county governments in the hands of the "bona fide white citizens." Some of the associations still operate and provide for a pre-primary nominating procedure, by which candidates are selected for primary races.[36] In other states in earlier years there was no doubt a greater disposition to make exceptions where negroes could be easily controlled by white Democrats, where factional fights necessitated the use of the negro as a balance of power, or where local "Uncle Toms" were admitted.[37]

IV. THE LEGAL STATUS OF PARTIES AND PRIMARIES

During the past eight years cases involving the validity of white primary regulations have arisen for adjudication before the state and federal courts in three states—Arkansas, Texas, and Virginia. Texas, however, has been largely the center of the legal controversy, because of several important decisions involving Texas arrangements.

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[34]286 U. S. 73, 76 L. Ed. 984 (1932).

[35]Interview of Miss Florence Spencer, University of Texas, with Mr. J. M. Patterson, chairman, Travis County, Texas, Democratic Executive Committee.

[36]Information furnished by Dr. Charles W. Ramsdell and Miss Florence Spencer of the University of Texas.

[37]LEWINSON, *op. cit., supra,* at 153-154.

Moreover, the three white primary decisions of the United States Supreme Court have all involved the Texas provisions for barring the negro from membership in the Democratic party. The last of these, *Grovey v. Townsend,*[38] was rendered on April 1, 1935, and apparently represents a final determination of the validity of white primary rules, at least for the states in which the circumstances surrounding the enactment of such rules are similar to those of Texas.

The validity of white primary rules might seem to be beyond question in view of the fact that all that are now in force have been enacted by party authorities and not by the state legislatures. On the other hand, it has been seen that in most of the white primary states the primary election laws specify or recognize some agency of the party as the authority to make additions to the qualifications set down by the law for participation in party primaries. Moreover, the direct primary as a method of nomination is mandatory, at least for the Democratic party, in half of the states considered, and the organization and procedure of the party as a whole is to a greater or less degree prescribed by law. Even in the other states, where the primary system is optional, the laws go into considerable detail in determining the structure of the party electing to use primaries, and, of course, in all such states the Democratic party has so elected. Moreover, in half the Southern states, the administration of primary elections is vested in the regular election officials, and in more than half, the state pays the expenses of holding the primaries. These facts have raised constitutional and legal issues involving the nature of political parties, the extent to which they retain their original character as voluntary associations, the meaning of a statutory provision which seemingly delegates to a subordinate party agency, like an executive committee, supplementary rule-making power, and, finally, of whether or not a primary is an election, or at least the preliminary stage of an election, rather than a mere pre-election nominating procedure which may be regulated by law without destroying its private character.

In short, if a political party is a voluntary association and not an agency of the state, its rules in regard to its membership, structure, and procedure are not acts of the state government, and are, therefore, not subject to the restraints placed upon the states by the Federal Constitution or by their own constitutions. On the other hand, if political parties, because the states have seen fit to regulate them, are state agencies, then they are equally subject to like constitutional

[38] 295 U. S. 45 (1935).

restraints. Moreover, if a party primary is an election, it follows that all restraints pertaining to elections fall with equal weight upon primaries. A white primary rule enacted by a voluntary association, to come more to the point, is not subject to the Fourteenth and Fifteenth amendments to the United States Constitution, while such a rule enacted by the state or its agency would be so subject.[39]

The holdings in regard to these questions are confused and not uniform even in the states in which the white primary is found. Some states have held that the primary is a part of the state election machinery. In the South, pronouncements to this effect have been made by state courts, notably in Florida, Louisiana, and Virginia.[40] On the other hand, courts in Arkansas, Georgia, South Carolina, and Texas have been inclined in the opposite direction.[41] Leading decisions in Arkansas and Texas have gone even farther, declaring political parties to be mere voluntary associations, in no uncertain terms. In *Waples v. Marrast,*[42] the Supreme Court of Texas stated that "A political party is nothing more or less than a body of men associated for the purpose of furnishing and maintaining the prevalence of certain political principles or beliefs in the public policies of government," but "they perform no governmental function. They constitute no governmental agency. The purpose of their primary elections is merely to enable them to furnish their nominees as candidates for the popular suffrage. In the interest of fair methods and a fair expression of their members of their preference in the selection of nominees, the state may regulate such elections by proper laws, as it has done in our general primary law," but "to provide nominees of political parties for the people to vote upon in the general elections, is not the business of the state." It is noteworthy that in the three states first named, the primaries are financed and adminis-

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[39]For general discussions of the judicial interpretation of primary laws, see: MERRIAM AND OVERACKER, *op. cit., supra,* ch. VI and LUTHER HARRIS EVANS, *Primary Elections and the Constitution,* 32 MICHIGAN LAW REVIEW, 451-477, (Feb. 1934).

[40]State ex rel. Landis, Atty. Gen., v. Casson, 154 So. 150 (Fla., 1934); State ex rel. Labauve v. Michel, 121 La. 374, 46 So. 430 (1908); and Dastugue v. Cohen, 131 So. 746 (La. 1931); and Commonwealth v. Willcox, 111 Va. 849, 69 S. E. 1027 (1911).

[41]Robinson v. Holman, 26 S. W. (2d) 66 (Ark. 1930); Norton v. State, 5 Ga. A. 586, 63 S. E. 662 (1909); State v. Huntley, 166 S. E. 637 (S. C. 1932); and Waples v. Marrast, 108 Tex. 61, 184 S. W. 180 (1916).

[42]108 Tex. 61, 184 S. W. 180 (1916). See also: Koy v. Schneider, 218 S. W. 479 (Tex., 1920); Cunningham v. McDermett, 277 S. W. 218 (Tex., 1925) White v. Lubbock, 30 S. W. (2d) 722 (Tex., 1930); Love v. Buckner, 49 S. W. (2d) 425 (Tex. 1932); Bell v. Hill, 74 S. W. (2d) 113 (Tex. 1934); Texas cases in line with Waples v. Marrast. For Texas cases tending to support opposite view, see: Briscoe v. Boyle, 286 S. W. 275 (Tex. 1926); Clancy v.

tered by the state,[43] whereas in the last four the parties are required to shoulder the expense and task of administration. Moreover, in Arkansas and Georgia primaries are optional.[44] These facts have a bearing on the question of the validity of white primary regulations.

V. CONSTITUTIONALITY OF THE WHITE PRIMARY

To return to the legal aspects of the white primary proper, attention must be directed mainly to Texas, where, as has been said, the principal cases have arisen. It has been noted that the Texas Legislature in 1923 attempted the experiment of establishing the white primary for the Democratic party in Texas by statute. The immediate cause for this was a factional feud within the Democratic organization in Bexar County which resulted in a disregard of the white primary party rule.[45] The Legislature was no doubt emboldened to take this unprecedented step because of the doubtful decision of the United States Supreme Court in the case of *Newberry v. United States,*[46] wherein all nine justices concurred in the practical result, but only four agreed to the "opinion of the court" that primaries "are in no sense elections for an office, but merely methods by which party adherents agree upon a candidate whom they intend to offer and support for ultimate choice by all qualified electors." From this the Texas Legislature assumed that no provision of the Federal Constitution contemplated the use of primaries or in any way restrained the states in regulating them as the legislatures saw fit. The Texas act, therefore, provided directly for the exclusion of negroes from the Democratic primaries as quoted above.[47]

The validity of this provision was first considered by a United States district court in the case of *Chandler v. Neff,*[48] in which a negro sought to enjoin the enforcement of the statute on the ground that it violated his rights under the Fourteenth and Fifteenth Amendments to the Federal Constitution. The court held that it was without power in equity to restrain the enforcement of a state statute on

Clough, 30 S. W. (2d) 569 (Tex. 1928); Love. v. Wilcox, 28 S. W. (2d) 515 (Tex. 1930); and Friberg v. Scurry, 33 S. W. (2d) 762 (Tex. 1930).

[43]Primary Election Laws of the State of Florida, Jan. 1934, sec. 361; General Statutes of the State of Louisiana, 1932, Vol. I, Title XIX, ch. II, secs. 2665, 2675; Virginia Election Laws, 1930, ch. 15, secs. 224, 245.

[44]Rules of the Democratic Party in Arkansas, 1934; GEORGIA CODE (PARKS, 1914), 1922 SUPPLEMENT, Title II, ch. 8; CODE OF LAWS OF SOUTH CAROLINA, 1932, Vol. II, Title 24, ch. 105; Texas Election Laws, 1928, ch. 13.

[45]See: LEWINSON, *op. cit., supra,* at 113.

[46]256 U. S. 232, 65 L. Ed. 913 (1921).

[47]*Supra,* note 11.

[48]298 Fed. 515 (W. D. Tex. 1924).

this ground, but it offered an opinion to the effect that the provision was within the police power of the state, that it was not in violation of the privileges and immunities clause of the Fourteenth Amendment, and that the Fifteenth Amendment protected only the right to vote in an election. The last point was based upon "the opinion of the court" in *Newberry v. United States.* In 1927, however, the United States Supreme Court invalidated the Texas law in the case of *Nixon v. Herndon.*[49] In this case Nixon, an El Paso negro, sued to recover damages on the ground that the "White Primary Law" denied him his constitutional rights under both the Fourteenth and Fifteenth Amendments. The Supreme Court avoided the issue which was unsatisfactorily met in the Newberry case and based its decision on the equal protection of the laws clause of the Fourteenth Amendment. Mr. Justice Holmes, in delivering the opinion, said: "We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. That amendment, while it applied to all, was passed . . . with a special intent to protect the blacks from discrimination against them. The statute of Texas . . . assumes to forbid negroes to take part in a primary election the importance of which we have indicated, discriminating against them by the distinction of color alone. States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."

Immediately after this decision was rendered, the Texas Legislature repealed the invalidated provision and enacted a substitute to the effect that "Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members, and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party."[50] The State Executive Committee of the Democratic party adopted under this statute a resolution, effective for the 1928 primaries, which barred negroes from participating.[51] In view of this resolution, the law authorizing it was questioned in the federal district court in the case of *Grigsby v. Harris.*[52] Relying on Texas decisions holding political parties to be popular and not governmental agencies, the court refused to invalidate the law. It further held that the rule-

[49]273 U. S. 536, 71 L. Ed. 759 (1927).
[50]Texas Election Laws, 1928, art. 3107.
[51]Quoted in Nixon v. Condon, 286 U. S. 73, 76 L. Ed. 984 (1932).
[52]27 F. (2d) 942 (S. D. Tex. 1928).

making power thus exercised by the State Executive Committee was not delegated by the Legislature, because it inherently belonged to the Committee. In fact, the law was leaving the power where it was first located and rightfully belonged. Later, in *White v. Lubbock,*[53] a case involving the same point, the Texas Court of Civil Appeals held that political parties in Texas were not governmental instrumentalities, but mere bodies of individuals, whose power to prescribe qualifications for membership was beyond statutory control.

Meanwhile two white primary cases were decided outside Texas. In *Robinson v. Holman,*[54] the Supreme Court of Arkansas decided in 1930 that the Democratic party in Arkansas was a voluntary organization and not an agency of the state, and that it had a right to prescribe rules and regulations defining the qualifications of membership and to provide that only white people could become members, without coming within the prohibition of either the Fourteenth or Fifteenth Amendment. These amendments, the court held, were directed against the action of a state, whereas the white primary rule involved was the act of an unincorporated, voluntary association of persons. The fact that the Arkansas statutes did not require the holding of primary elections was also cited. An appeal from this decision to the United States Supreme Court was dismissed for want of jurisdiction.[55]

In 1929, the white primary rule of the Democratic State Convention in Virginia was questioned before a federal district court in *West v. Bliley.*[56] The court relied on *Nixon v. Herndon* as well as the Virginia decision of *Commonwealth v. Willcox,*[57] which held that primaries were in essence elections. It decided that the primary statute had in effect delegated to the Convention legislative power which did not exist under the prohibition of the Fifteenth Amendment. The United States circuit court of appeals upheld the decision, declaring that the Virginia Legislature could not do indirectly what it could not do directly.[58] It will be remembered that the primary system of Virginia, while optional, is financed and administered by the State.

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[53] 30 S. W. (2d) 722 (Tex. 1930).
[54] 26 S. W. (2d) 66 (Ark. 1930).
[55] 282 U. S. 804, 75 L. Ed. 722 (1930).
[56] 33 F. (2d) 177 (E. D. Va., 1929).
[57] 111 Va. 849, 69 S. E. 1027 (1911).
[58] Bliley v. West, 42 F. (2d) 101 (C. C. A. 4th. 1930).

VI. NIXON V. CONDON

Returning to Texas, the statute, referred to above, which recognized the right of state party executive committees to make rules of membership, did not long go unchallenged. In 1929, the same Nixon who had figured in *Nixon v. Herndon,* questioned the validity of the statute in an action for damages against primary election judges for refusing to permit him to vote in the Democratic Primary of 1928. The rule adopted by the Democratic State Executive Committee under this law provided that "all white Democrats who are qualified and under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110 Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary election to be held July 28, 1928 and August 25, 1928, and further that the chairman and secretary of the State Democratic Executive Committee be directed to forward to each Democratic county chairman in Texas a copy of this resolution for observance."[59] The federal district court held that the Democratic State Executive Committee in passing this resolution was not acting as an agent of the state and was not a body corporate to which state legislative authority could be delegated, nor was the primary an election within the meaning of the Fifteenth Amendment.[60] Upon appeal the United States circuit court of appeals affirmed the judgment.[61]

On May 2, 1932, however, the Supreme Court of the United States, by a vote of five to four, reversed the lower court and declared Article 3107 unconstitutional under the Fourteenth Amendment.[62] Mr. Justice Cardozo, in delivering the majority opinion, said in part: "Whether a political party in Texas has inherent power today without restraint of any law to determine its own membership, we are not required at this time to determine. . . . Whatever our conclusion might be if the statute had remitted to the party the untrammeled power to prescribe the qualifications of its members, nothing of the kind was done. Instead, the statute lodged the power in a committee, which excluded the petitioner and others of his race, not by virtue of any authority delegated by the party, but by virtue of an authority originating or supposed to originate in the mandate

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[59]Quoted in Nixon v. Condon, 34 F. (2d) 464 (W. D. Tex. 1929).
[60]*Id.* at p. 469.
[61]49 F. (2d) 1012 (C. C. A. 5th, 1931).
[62]Nixon v. Condon, 286 U. S. 73, 76 L. Ed. 984 (1932). Justices McReynolds, Van Devanter, Sutherland, and Butler dissented. The discussion of the case of Nixon v. Condon is reproduced by permission from the writer's article, The Texas Direct Primary System, 13 SOUTHWESTERN SOCIAL SCIENCE QUARTERLY, 95 at 117, 118, 119.

of the law. . . . Whatever inherent power a state political party has to determine the content of its membership resides in the state convention. There platforms of principles are announced and the tests of party allegiance made known to the world. What is true in that regard of parties generally is true more particularly in Texas, where the statute is explicit in committing to the state party convention the formulation of the party faith. (Article 3139). The State Executive Committee, if it is the sovereign organ of the party, is not such by virtue of any powers inherent in its being. It is, as its name imports, a committee and nothing more, a committee to be chosen by the convention. . . . (Article 3139) . . . The pith of the matter is simply this, that, when these agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power."

Thus once again the Supreme Court could fall back upon the Fourteenth Amendment and avoid saying whether or not a primary election in Texas was an election under the Fifteenth Amendment, and, incidentally, whether or not a political party was an agency of the State. The "inherent" power of the party and its status as a voluntary association as held by the Texas courts were left to stand for the time being. As Mr. Justice McReynolds pointed out, however, in the dissenting opinion, it was not new in Texas to vest party executive committees with ultimate powers, and "such grants are not necessarily contrary to the will of the party." Moreover, he contended that "Political parties are fruits of voluntary action. Where there is no unlawful purpose, citizens may create them at will and limit their membership as seems wise. The State may not interfere. White men may organize; blacks may do likewise. A woman's party may exclude males. This much is essential to free government." A political party, he continues, "must yield to reasonable conditions precedent laid down by statute. But its general powers are not derived from the State, and proper restrictions or recognition of powers cannot become grants." Thus he meant that the Texas Legislature, in the act invalidated, had not granted a power; it had simply recognized one as existing inherently in the party; it was going back to the situation such as it was prior to the enactment of the "White Primary Law" of 1923.

The Democratic State Convention in May, 1932, in view of *Nixon v. Condon,* asserted its "inherent" authority and passed a resolution similar to the ones issued by the State Executive Committee

in 1928 and 1930. In view of the above court decision, some Democratic county chairmen announced their opposition to the rule in theory, others stating that their county organizations would defy the State Convention and refuse to observe the rule.[63] This attitude on the part of some county Democratic organizations in Texas was, however, not new; the principle of the white primary had been habitually violated in several counties where political advantage was to be served by allowing negroes to vote in the primaries.[64]

With the second Nixon case in mind, however, two injunction suits were brought before the federal district court on the eve of the first primary election of 1932 by Houston and San Antonio negroes to compel election judges to permit them to vote. This court on July 20th, held that the relief asked was in the nature of a *mandamus,* which was beyond its competence to grant, but the opinion was advanced that the Democratic State Convention was the agent of the State, and that, since the State could make no such rule, the Convention assuredly could not.[65] On the day following this decision, suit for injunction was filed in the Forty-fifth District Court of the State of Texas in San Antonio, and on July 22, the day before the first primary, this court issued the injunction, basing its decision on the second Nixon case. On the same day, however, the Fourth Court of Civil Appeals set aside the injunction on the ground that a political party is a voluntary organization with the right to determine its own membership.[66] On August 2, upon application of the party bringing the suit, the last named court certified the question to the state supreme court as to the authority of the Democratic State Convention to bar negroes from the primary. This court, however, dismissed the question on technical grounds and thus upheld the appellate court in setting aside the injunction, but gave no inkling as to its view on the question involved.[67]

The issue arose again in 1933 and 1934, resulting in several decisions. In *Drake v. Executive Committee of Democratic Party for the City of Houston et al,*[68] a federal district court upheld the white primary rule on the ground that the Democratic Convention in pass-

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[63]See San Antonio Express, May 18, June 22, July 22, 1932.
[64]See LEWINSON, *op. cit, supra,* at 147-148, 154, 155.
[65]White v. County Democratic Committee, 60 F. (2d) 973 (S. D. Tex. 1932).
[66]County Democratic Executive Committee v. Booker, 53 S. W. (2d) 123 (Tex. 1932).
[67]County Democratic Executive Committee in and for Bexar County et al v. C. A. Booker, 52 S. W. (2d) 908 (Tex. 1932).
[68]2 F. Supp. 486 (S. D. Tex. 1933).

ing it acted in the exercise of powers inherent in the party, which was not an agency of the State because no authority had been conferred upon it by statute. In 1934 the federal district court at El Paso handed down an oral decision in which the rule was interpreted as not specifically excluding negroes from the Democratic primaries in that it simply stated that "white persons who are qualified voters shall participate in the primaries."[69] The Texas Court of Civil Appeals also in 1934 decided that the white primary resolution of the Democratic State Convention was the lawful act of a voluntary association.[70]

VII. RECENT DECISIONS

Finally, in July, 1934, the Supreme Court of Texas met squarely the issue of the white primary in *Bell v. Hill*.[71] The relators, negroes, claimed to be Democrats and sought a *mandamus* against various State and Party officials to allow them to vote in the primaries of 1934. The court held that the State Convention, as the highest agency of the Democatic party, had an inherent right to bar negroes. Political parties were again defined as voluntary associations, and their right as free associations to determine their own membership was upheld under the Bill of Rights of the Constitution of Texas. It was further declared to be beyond the competence of the Legislature to confer such a right. This decision was of great importance and was relied on by the United States Supreme Court in the recent decision of *Grovey v. Townsend*.[72]

Grovey v. Townsend was brought on *certiorari* to review a non-appealable judgment of a justice court in Harris County, Texas, involving a suit for ten dollars damages against the county clerk who refused the petitioner an absentee ballot for a Democratic party primary election, because he was of the negro race, and the rule of the Democratic State Convention of Texas limited participation in the primary to white citizens. The main contention was that the rule was the act of the State, and hence the provisions of the Constitution and statutes of Texas permitting its enactment were in violation of the Fourteenth and Fifteenth Amendments of the Federal Constitution. This contention was based on the arguments: that the primary was held under statutory compulsion; that it was wholly statutory in origin and incidents; and that those charged with its management

[69] San Antonio Express, Feb. 8, 1934.
[70] Mason v. County Democratic Executive Committee of Dallas County, 74 S. W. (2d) 326 (Tex. 1934).
[71] 74 S. W. (2d) 113 (Tex. 1934).
[72] 295 U. S. 45 (1935).

had been deprived of all power to establish qualifications for participation. Moreover, it was contended that the State Democratic Convention was a mere creature of the State and could not lawfully do what the Federal Constitution prohibited to its creator. Another argument presented was that, since the Democratic primary amounts to an election in Texas and since candidates for Senator and Representative in Congress were to be nominated in the particular primary involved, the rule was a forbidden discrimination. Lastly, the Democratic organization in Texas, it was argued, was a mere part of a national party which had never declared a purpose to exclude negroes.

The court dismissed all these contentions mainly on the ground that the discrimination could not be laid at the door of the State. "While it is true," the opinion reads, "that Texas has by its laws elaborately provided for the expression of party preference as to nominees, has required that preference to be expressed in a certain form of voting, and has attempted in minute detail to protect the suffrage of the members of the organization against fraud, it is equally true that the primary is a party primary; the expenses of it are not borne by the State, but by members of the party seeking nomination (Articles 3100, 3116); the ballots are furnished not by the State, but by the agencies of the party (Articles 3109, 3119); the votes are counted and the returns made by instrumentalities created by the party (Articles 3123, 3124-5, 3127); and the State recognizes the State Convention as the organ of the party for the declaration of principles and the formulation of policies (Articles 3136, 3139)."[73] Moreover, in answer to the argument that the Convention was a creature of the State, the court said that ". . . nothing is shown to indicate that the regulation of the method of choosing delegates or fixing the times of their meetings, was intended to take away the plenary power of conventions in respect of matters as to which they would normally announce the party's will. . . . We are not prepared to hold that in Texas the state convention of a party has become a mere instrumentality or agency for expressing the voice or will of the state."[74] Lastly, alluding to *Bell v. Hill,* the opinion points out that "The state, as its highest tribunal holds, though it has guaranteed the liberty to organize political parties, may legislate for their governance when formed and for the methods whereby they may nominate candidates, but must do so with full recognition of the right of the

[73] *Id.* at 50.
[74] *Id.* at 54.

party to exist, to define its membership, and to adopt such policies as to it shall seem wise."[75] The other contentions were briefly dismissed.

This decision, while very significant, does not finally dispose of the question of the white primary, at least for states where conditions are markedly different from those in Texas. The court in this case stressed peculiar conditions in Texas and relied heavily upon the decision of the state supreme court in regard to the statutory basis of the primary system in Texas. The fact also that the Convention, the highest authority of the party, made the rule without any specific statutory recognition of its right to do so, was of influence. Moreover, special note was taken of the fact that the party bears the burden of administering and financing its primary elections. It has been seen that a majority of the white primary states do not meet all these conditions. On the other hand, some of the other laws, unlike the Texas law, provide for an optional direct primary, a fact that should have considerable weight in supporting the non-compulsory character of the primary, if not the voluntary character of the party. The holdings in some states as to the public character of the primary election might count against the validity of their white primary rules. Finally, the issue of the nature of the primary is not finally decided for all states and certainly not with reference to congressional elections. Should Congress, at some later date, lay down more extensive regulations for such elections, the question involved in *Newberry v. U. S.* might again come up for adjudication.

[75] *Id.* at 53.

"THE ESSENTIALS OF A SUCCESSFUL LAWYER"*

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Before preparing this address I sent out letters to about forty of the most distinguished members of the Bench and Bar of Mississippi asking from each a letter giving what, in his opinion, were five essentials of a successful lawyer. An analysis of these answers showed that, in the opinion of these lawyers, there were about thirty-five such essential qualities. However, I have grouped these under five general headings, as reasonably coming thereunder, and, thus fortified, I will present them to you.

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I.

GOOD CHARACTER

In my judgment the first, foremost, and great essential for a successful lawyer is good character. Under this general heading may be combined, as coming thereunder, the following traits: Honesty, integrity, truthfulness, unselfishness, and faithfulness. It embraces being a gentleman and a minister of justice.

By honesty I do not mean that brand comprehended under the maxim, "Honesty is the best policy." The honesty of which I speak is far over, and above, and beyond, and more comprehensive than that. It includes both moral and intellectual honesty. A successful lawyer must be honest with the court, honest with his clients, honest with his fellowmen, and honest with himself. No lawyer will ever be successful whose honesty is only the type such as the times will permit. On the contrary, the successful lawyer must have the character and honesty taught us at our Mother's knee. It is the kind of honesty described by Edgar A. Guest in the following lines:

> " 'An honest man's the noblest work of God,'
> The line is Pope's, as everybody knows,
> Yet must the great Creator think him odd
> Who boasts that he was honest at life's close.

*Excerpts from an address delivered on February 15, 1935, before the Law School of the University of Mississippi by Major W. Calvin Wells, President of the Mississippi State Bar, 1934-1935.

I doubt the true nobility that stays
Precisely to the promise and the fact.
It merely means that what it owes it pays,
But gives no hint of any kindly act.

The bitterest man that I have ever known
Was honest to the penny till he died.
Of all the gentle virtues, that alone
Became his one obcession and his pride.

One can be honest and be cold as steel,
One can be honest and to pain be blind.
One can be honest and no pity feel,
Nor can the law compel him to be kind.

Not noblest he who merely honest stays
And by a narrow code his life directs.
I'm sure from all who'd win the Master's praise
There is a tenderness that God expects."

Remember, young gentlemen, a lawyer is a trustee without bond. If you shall shortly forget every other thought I shall endeavor to impress upon you in this address, pray cling to this thought: Never commingle the funds of your clients with your own funds. Keep your clients' funds separate, not mingled with your own. Pass out of your hands into the hands of your client such trust funds immediately, or at the earliest possible moment. If immediate payment is not possible, by all means place such funds on separate deposit, entirely apart from your own. That is only common honesty. To remember and act upon this admonition may be to save you from disgrace and dishonor. Engrave it upon your minds and hearts. Never forget it.

The kind or brand of honesty that will make you successful is that which makes for clean living and fair dealing in private and professional life, fair and honest dealing with the courts. It gains for the lawyer the confidence and respect of the public and the courts alike. This brand of honesty requires a lawyer to satisfy his own conscience in any contemplated plan of action, in court and out of court, before setting out to perform it. "To thine own self be true, and then it needs must follow as the night the day, thou canst not then be false to any man."

A young lawyer who sets sail into the legal sea without such brand of honesty, sails without a compass. During the past few years there

has been considerable criticism of the Bar as a whole. There has been enough truth in some of that criticism with reference to a few members, to make it sting. The few have brought discredit upon the many. Sailor, beware.

Almost synonymous, but not quite so, with honesty, is integrity. George Washington, in his farewell address, said in substance, that he had never known integrity in its true sense unless, and only when, based upon those ethical principles having their root in the Holy Bible.

Historians tell us that the character and integrity of a people rises no higher than their conception of a Supreme Being, by whatever name known. Happy is that young lawyer reared in a home where these principles have been taught from the earliest childhood, so that they have become the very warp and woof of his life. The young lawyer who believes in a personal God, not an impersonal force, an all-seeing and all-knowing God who knows and cares, who notes even the sparrow's fall, who approves of the good and who is displeased with the evil, and from whom not even our secret thoughts can be hid, will begin his career on a firm foundation and not on shifting sands. I trust that every one of you sincerely, honestly, and without hypocrisy believes and trusts in such a Supreme Being.

A successful lawyer must be a truthful lawyer, absolutely, unqualifiedly, without evasion or subterfuge, truthful to his clients, truthful to the courts, truthful to the jurors of the country, truthful to the public. The liar and deceiver have no place in the profession of law.

The successful lawyer must be unselfish.

I shall not wander afield in a discussion of what the term successful lawyer embraces. I leave it to your own vision and judgment. Certainly it does not necessarily include the lawyer who wins large returns in fees from his clients. The guiding counsel of the gangster might be included in the term successful lawyer if that term included the money-maker, irrespective of how he made the money.

The successful lawyer must be faithful. He must keep faith with the world. His entire career will be built on faith put in him by his fellowmen. There will be committed to him and to his faithful keeping the life, liberty, and property of his clients. The greatness of the trust merits faithfulness of service. Humble faith in the Supreme Being, above described, by a lawyer, begets in others confidence and faith in him. Happy is the man who has honestly and

sincerely that humble faith, untouched and unmarred by agnosticism and atheism.

A successful lawyer must be a gentleman. One distinguished lawyer, in his reply to my letter, wrote as follows:

> "When I visited London in 1924, when the meeting of the American Bar Association was held there, I was told that in considering a lawyer for a judicial position, the sole inquiry in England is, 'Is he a gentlemen?' The theory in England is that, with this qualification, the other essentials of a Judge will come with experience. In my opinion this qualification is equally essential for a successful lawyer."

And, lastly, under good character it must ever be remembered by you that as a lawyer you are an officer of the court. You are, in the highest meaning of the term, a minister of justice. To the few shysters who disgrace our profession, such a statement is a jest. It is the expression of folly of a fool. It has no part in their lives. Would you be a successful lawyer? Then keep in mind: You are a minister of justice.

II.

SYSTEMATIC DIRECTED INDUSTRY

Next to good character, with its various implications, I would place systematic directed industry as the quality most needed and helpful to make a successful lawyer. I could, I believe, spend hours in a discussion of this topic. It is one essential that seems to me to be lacking in so many members of the Bar. How such lawyers expect to succeed is beyond my comprehension. The profession of the law is greatly overcrowded. You will find competition fierce, keen, and I might say, cruel. Under this heading of systematic directed industry, and as component parts thereof, I would say that the successful lawyer must have perseverence, patience, system, and a well-balanced distribution of his time. He must remember that the Law is a jealous mistress.

Perseverence and patience go hand in hand. The lawyer who is easily discouraged will never be successful. In the life of every lawyer and in the trial of every case there must be sunshine and shadow. There must be disappointment as well as success. Unless you young gentlemen when you enter the practice of law are so constructed that you can be knocked down, run over, and flattened out, and then get up again, and fight, and fight, and fight, as though

nothing had happened, you will be greatly handicapped in your quest of success as a lawyer.

The successful lawyer must have infinite patience, patience with fools and with wise men, patience in working out the minutest details in every step in the progress of a case.

As you young lawyers enter upon the practice of law, some of you will be more gifted and blest in the possession of some of the essentials of a successful lawyer than others, but in one respect each and every one of you will be on an equal footing: To each of you is given in every day a full twenty-four hours. The test will be how you are going to use these twenty-four hours. There must be, to be successful, the very wisest distribution of your time. There must be considered the time to be given to God, the time to be given to one's family, the time to be given to civic affairs—all make their just demands on the successful lawyer's time. But a large portion of that time, to be successful, must be given to the pursuit of your professional duties. How little do some lawyers regard the necessity of regular hours in their offices, even when not actually engaged in the preparation of cases for trial. The young lawyer dawdling away his time on the street corner, in the drug store, in the pool room, or on the golf links, is not usually the one to whom clients want to intrust their business. As was well said by Honorable W. M. Cox:

> "The law is an exacting profession. Its rewards are not for the ignorant and idle. No lawyer, especially no young lawyer, should ever squander his time. He can always employ it profitably. If not engaged about any particular piece of business he should be busy with his books. Otherwise he will soon forget much of what he had learned of the general principles of law, and be poorly informed as to statutory innovations and the advances made by the courts in the construction and application of statutes and of general principles."

Procrastination is a vice all too common with the legal profession, in my opinion. The average lawyer is disposed not to do today that which he can postpone until tomorrow. Diligent, energetic, and close application to the task at hand always yields its rewards in the practice of law. With perseverence, patience, and intense application, so attend to every piece of business that comes into your hands, that, at the conclusion of the task, you would be willing to have your reputation as a lawyer based solely and alone upon that one piece of work.

As stated, the law is a jealous mistress. Sometimes the young lawyer is tempted to join with his legal work other fields of endeavor, such as insurance, or farming, or real estate, to help yield an adequate income for his support. No one seeking to be a successful lawyer could make a greater mistake. Again, as the lawyer succeeds and his fees and emoluments increase to a point beyond that necessary for his proper support and for that of his family, lawyers are prone to make investments in various industries, thinking they will bring other business to them of a profitable nature, and they squander their time and energies in undertaking to make successful these ventures, which so often turn out disastrously. Professional men, with large ability in their professions, earning large incomes, are frequently the biggest suckers in making investments. A lawyer should be thrifty. However, in reviewing the careers of the many lawyers I have known in the last thirty-five years, and in looking over the inventories of their estates, I have found that those lawyers in practically every instance who had amassed the largest estates, had invested their surplus funds in high grade, low rate producing bonds, and in life insurance. These investments will require practically no time and attention away from the profession, and have yielded by far the largest net returns.

III.

LEARNING

The next great essential of a successful lawyer may be covered by the word "Learning." It is true that in times past lawyers with little education and learning, both academic and legal, have been successful. As the means of obtaining such education have increased throughout the country, however, almost any young man aspiring to be a lawyer, no matter how limited his finances, if he is willing to undergo the hardships and has the patience and perseverence so to do, can secure that education. And now in this day and time, with the keen competition which you are facing in your profession, without this learning you will have a handicap almost impossible to overcome. Those with whom you will compete, will, almost without exception, have secured such education. The young lawyer who enters upon the performance of his duties without the learning acquired in securing an academic degree—have no misapprehensions on this subject—is going to be thoroughly handicapped, and the success, to which he might otherwise have attained, if he had obtained such

learning, cannot be as great under present circumstances and conditions, as if he had persevered and secured such training. To an even greater degree will the young lawyer be handicapped who has not carefully, patiently, and painstakingly taken his full course of legal training in the best law school which his resources will afford him. It is the foundation on which to build. He must have a thorough, not a superficial, grasp of the common law, of the great equitable principles which have come down to us from the old High Court of Chancery in England, of the changes made therein by our courts by judicial construction and by statutes, and of the great constitutional principles laid down in the constitutions of the United States and of the state in which he is to practice. Unless such foundation is had, difficult indeed will be the path of the young lawyer aspiring to the highest degree of success.

I do not think any man is well educated unless, in addition to the above described learning, he has learned and knows people, and knows how to get along with them. I have seen the career of many an aspiring young lawyer, eager and ambitious for success, wrecked by his inability to join in happily with the people by whom he is surrounded, by inability to get along with the Bench, the fellow members of the bar, with his clients, with the people who compose the juries of the country.

You young gentlemen, if you have had any large number of serious disagreements with your fellowmen, give thoughtful consideration to why each of these unhappy occurrences took place. Study them as you would a case. Analyze the situation confronting you then, and determine if you were not in fault. Do not hunt for alibis. I have known men who always have perfect alibis for failure for every occasion. Success does not come by alibis, good or bad, for continued failures. Success comes by overcoming the multitudinous difficulties that beset the lawyer every day of his life. It is the overcomer, not the alibier, who reaches the height of success.

No man can claim to be an educated or learned man, whose mind is so trained that he fails to answer a letter promptly on the day of its arrival, or not later than the day following, if within the bounds of possibility. If such lawyer be actually engaged in the trial of a case, there are still hours out of the twenty-four, before the opening of court and after the adjournment thereof. Nothing disgusts a client or a brother lawyer more than failure to receive prompt acknowledgment of communications, and prompt action thereon. No

mind is trained and educated to think clearly and logically that fails in these respects.

IV.

RESOURCEFULNESS

No lawyer will ever reach the heights of success who is not resourceful, and, along with and allied with it, who is not tactful, courteous, and thereby of attractive personality. In a way, some of these qualities have been touched upon before by me in this address. In the battle and trial of many a case, something totally unexpected is going to happen. No matter how careful, patient, and thorough has been the preparation of the case, something will happen that could not be foreseen. The difference between the successful and the unsuccessful lawyer is, many times, measured by the ability at that crisis to meet the unexpected with calm demeanor and resourceful reply. At such time self-control is a prime virtue. Ability to express no surprise, no chagrin, and no despair. With courage and tact meet the onslaught. One of the most resourceful lawyers I ever saw in action was the late Honorable J. W. Cutrer of Clarksdale. I was sitting as Special Judge in a case involving very large sums of money. His client had been on cross-examination literally for weeks, when suddenly he answered a vital question, quickly and shrewdly asked him by opposing counsel, in such a way as to practically destroy his entire testimony up to that point in the trial. I looked quickly at Mr. Cutrer to see what effect it would have on him. One could never have told by the expression on his face, or by his attitude or demeanor, that he was in the least disconcerted, and afterwards on re-direct examination, by bringing out another point not included in the answer, most of the damaging effect of the answer was entirely explained and eliminated.

The successful lawyer will be courteous and tactful in his dealings with witnesses on the stand. I have never seen bull-dozing tactics pursued by an attorney which did not immediately cause sympathy on the part of the jury toward the witness, and hostility toward the cause represented by the bull-dozing attorney. I have never seen discourtesy of one practicing attorney toward another, without observing a reaction to the disadvantage of the boorish barrister. On the other hand, I have seen the attractive personality of the tactful, courteous lawyer win the respect and admiration and even affection of jurors, who had never even seen the lawyer in action prior to that time. The highest success is obtained by the lawyer who

is considerate, gracious, and kind in his attitude and demeanor toward all men. As a result of such attitude there is an indefinable something—whether it be personality, magnetism, or whatnot—that is added to the other prerequisites of a successful lawyer.

Such conduct, furthermore, in nowise prevents the earnest aggressiveness which is so necessary to the successful conduct of a case.

Again let me impress upon you that no lawyer will ever be successful, in any proper interpretation of the word, who attitudinizes before the court, jury, and public, who appears to take pride in bull-dozing and bullying witnesses, engages in improper side-remarks during the course of a trial, seeks to intimidate opposing counsel, and, if it suits his purpose, does not hesitate to make vicious attacks upon opposing counsel. So to do is certainly not to be a gentleman, and in my opinion no man can be a successful lawyer who is not a gentleman.

V.

COMMON SENSE

I come now in my discussion to that attribute of a successful lawyer which, if not naturally possessed, it seems to me is the most difficult of all to attain in spite of heroic efforts to that end. Some men are born without common sense. They are brought up in an atmosphere in the home where common sense is lacking, and when manhood's estate is reached, this lack of common sense seems to become greater instead of less. The lack of common sense seems to be hereditary. The pity of the whole matter is, that a man who has no common sense never knows it.

I might add that if a man thinks differently from practically everyone else in the community, the strong probability is that that one man is wrong. He should thoroughly consider the matter and analyze it carefully and see if he is not wrong. I do believe in independence of thought, but carried too far it is usually destructive of the attainment of success. There is danger of there being more truth than poetry in the case of such a one as is illustrated in the old story of the response made by the foreman of a jury to a bailiff, who inquired from the jury, which had retired to consider of its verdict, whether he should order supper for twelve. The foreman replied: "No, order supper for eleven and a bale of hay for one."

The only hope for a young lawyer aspiring to success, who finds himself continually viewing the issues as they arise before him in a manner different from everyone else, is a searching self-analysis,

a critical self-examination, in an effort to bring himself in line with the thought of others with whom he must constantly associate and do business.

In the last analysis, however, I am very much afraid that if one is born without common sense, and does not make a determined effort to acquire it, he is doomed in his efforts to become a successful lawyer. All the essentials to the making of a successful lawyer heretofore discussed I think are largely capable of development, if not naturally possessed.

Summing up, may I quote the words of a distinguished and successful lawyer with reference to the conduct of litigation, who said:

> "If litigation comes, then it is war, but honorable war, and in its conduct the true lawyer, the man who deserves success, must face with high courage every danger. The frenzy of the mob should not deter him from doing his duty as he understands it. Judicial arrogance should not overawe him into servile submission to erroneous decision. He should be bound by no fetters of gold, blinded by no prejudice of creed or party, but, deaf to all appeals of ignoble self-interest, he should be the loyal lover of his jealous mistress, the law."

I would call your attention in passing to the fact that not one of the forty distinguished attorneys, to whom I addressed my inquiry as above stated, named the use of intoxicating liquor as one of the essentials of a successful lawyer.

Now, a few words of consolation: Doubtless, by this time, each of you, my hearers, is asking himself, "Who is sufficient for these things?"

In the first place, doubtless each of you, to some degree, has these essentials—some more, some less. Some of you have some of them to a high degree. The more of these elements, the greater will be the success. Some of them by studious, serious effort you can develop. Frankly, some of you will never be successful trial lawyers, and still, I predict, will become successful lawyers.

In the last analysis, none of you will be successful lawyers without good character.

By judicious selection of partners you may supplement each other. One of you may become a gifted trial lawyer, honest, quick in thought, gracious, tactful, courteous, and aggressive in action. Another may lack most of these essentials, but be honest, industrious, painstaking, patient, and studious, with a world of common sense, who will pre-

pare a case for trial in a perfect manner. Let the two form a partnership and the firm will rise to great heights of success, where separate and apart neither might win any large measure of success.

Then, independent of such partnership plan, there are branches of the practice of law in which some of you will gain preeminence as successful practitioners, without having all of the elements which I have outlined.

So, young gentlemen, do not be discouraged. Resolve with a mighty will, with resolute determination, that insofar as you are able so to do, endowed as you are by nature, insofar as your gifts will enable you, you will acquire, cultivate, develop, enjoy, and exercise, to the highest degree of which you are capable, each and every one of these great qualities and essentials, to the end that you shall become indeed and in truth a successful lawyer. Aye, not only a successful lawyer, but a great lawyer, successful and great in the highest and noblest sense of the word.

AN INTERPRETATION OF SECTIONS 119, 120, AND 196 OF THE NEGOTIABLE INSTRUMENTS LAW

L. C. ANDREW* AND J. J. LENOIR**

Credit transactions take a variety of forms, from which we may take two which are in frequent use today. They are the borrowing and lending of money, and the sale and purchase of property on credit. In these are involved a number of legal relations, varying in each case according to the scope of the particular transaction. The borrower of money is interested in securing the money, the creditor is concerned with security for the debt. In selling property on credit the concern of the purchaser is to obtain a good title, that of the vendor with receiving security for the purchase price.

The lender of money may be satisfied with the individual undertaking of the borrower, or he may require that some third party become responsible either directly or secondarily for the debt of the principal. If this arrangement is executed, then third parties are brought into the transaction, and new contractual relations arise between the parties. Involved are reimbursement, contribution, and subrogation, and in determining the liability of the surety or guarantor, the Uniform Negotiable Instruments Law must be considered, and sometimes the Law Merchant.

If, without the assent of the surety or guarantor, the holder of a note makes a binding agreement with the debtor to extend the time of payment, or to postpone the holder's right to enforce the instrument, and suit is ultimately brought against the surety, the right of recourse against such party not being expressly reserved, the question frequently is as to whether the surety is discharged. It is conceded that under the Uniform Negotiable Instruments Law a guarantor is discharged because his liability is secondary. However, since the surety's undertaking or liability is primary and direct, and upon default of the principal debtor the debt becomes that of the surety, it is argued that his case is an omitted one, and unless the defense under the common law is available to him he is liable for the debt.

We do not believe that the Supreme Court of Mississippi, since the adoption of the Uniform Negotiable Instruments Law, has passed

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on this precise point. In this connection, however, it is interesting to see what other jurisdictions have held in the matter. One of the first cases involving the question outlined above was *Cellers et al. v. Meachem et al.*,[1] in which there was a construction of Sections 119,[2] and 120[3] of the Uniform Negotiable Instruments Law. The facts were as follows: Meachem and Lyons signed a promissory note which was executed on December 27, 1904, and was to run for "90 days after date." When Lyons signed the note he added the word "surety" after his name. After the note was executed, the plaintiffs, in consideration of additional securities given them by Meachem, and without the knowledge and consent of Lyons, extended the time of payment. On Meachem's failure to pay when the note became due, Ada Marie and Bessie Cellers brought this action against him and Joseph Lyons. Meachem failed to appear and default was entered against him. Lyons answered. He admitted the execution of the note, and for an affirmative defense pleaded that he signed the note as surety only, "without consideration, and for the sole use and benefit of Meachem and of the plaintiff," and that the payee had full knowledge of the conditions under which the promissory note was executed. He affirmed that for the extension of time and other reasons, he, Lyons, was relieved from all liability.

In the trial court evidence was admitted over the plaintiffs' objections and exceptions, "tending to show an agreement extending the time as alleged." When the trial closed, the plaintiffs' counsel requested the court to direct a verdict in favor of their clients for the sum demanded, as there was no dispute as to the amount due. However, the request was denied. Instead, the court acceded to the defendant's motion by instructing the jury, among other things, that

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[1] 49 Ore. 186, 89 Pac. 426 (1907).

[2] Sec. 119 provides: "A negotiable instrument is discharged: (1) By payment in due course by or on behalf of the principal debtor; (2) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; (3) By the intentional cancellation thereof by the holder; (4) By any other act which will discharge a simple contract for the payment of money; (5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right."

[3] Sec. 120 provides: "A person secondarily liable on the instrument is discharged: (1) By any act which discharges the instrument; (2) By the intentional cancellation of his signature by the holder; (3) By the discharge of a prior party; (4) By a valid tender of payment made by a prior party; (5) By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

if they found that the plaintiffs, after the maturity of the note, had entered into an agreement with Meachem extending the time of its payment without the consent of Lyons, no recovery could be had against him. There were exceptions to these rulings by plaintiffs' counsel. The jury returned a verdict for the defendant.

Several interesting questions arise from the facts in this case, the principal one being whether Lyons was relieved from liability because of the extension of time of payment of the note. The Supreme Court of Oregon reversed and remanded the suit, thus holding that Lyons was liable. Before making any comments on the case we will examine the reasoning of the higher court.

The Supreme Court of Oregon was of the opinion that prior to the adoption of the Negotiable Instruments Act of 1899 no judgment could be rendered against Lyons, according to the facts as presented.[4] The policy of the Oregon courts before that date was to recognize an extension of payment as changing the contract.[5] Taking this fact as a major point of consideration, the court undertook an examination of the Negotiable Instruments Law in order to ascertain whether certain sections of that act made any changes in the prior law. In other words, did the Negotiable Instruments Law change the rule of suretyship previously recognized in Oregon? What was the effect of the Oregon statute (N. I. L.) upon the relation of the parties? The court came to the conclusion that the answer to that question depended upon whether Lyons was primarily liable on the note. "If his liability was only secondary, the right to recover against him would be dependent upon the proving of the agreement as alleged." It therefore was important to determine the exact nature of the agreement. The court reasoned that the word "surety" could only affect the status of the makers of the note as between themselves, "and as Lyons' liability to the plaintiffs is the same as if he had signed the instrument without using the qualifying word after his name, he became, in the language of the negotiable instruments act, 'absolutely required to pay,' and therefore primarily liable."[6] The court disregarded Lyons' contention that the note was

[4]Those holdings of the Oregon courts conformed to the commonly accepted principles of suretyship. See ARANT, SURETYSHIP, 284-303, Sec. 68 (1931). See, also, 1 BRANDT, SURETYSHIP AND GUARANTY (3rd Ed. 1905), 719-725.

[5]49 Ore. 186, 89 Pac. 426, 428 (1907): "Prior to May 17, 1899, a valid agreement entered into between a principal and the payee of a negotiable instrument, binding the latter, without the assent of the surety, whereby the time of its payment was extended, relieved the accommodation maker, whether his liability was primary or secondary, and the existence of such agreement could be shown by parol. Findley v. Hill, 8 Ore. 249, 34 Am. Rep. 578."

[6]49 Ore. 186, 89 Pac. 426, 428 (1907).

executed for the benefit of Meachem and the plaintiffs. It reasoned that "a person cannot enter into a contract, even though solely for the benefit of another, and then shield himself from responsibility on the theory that the purchaser has knowledge that his acts are without actual consideration."[7]

The court quoted Secs. 196,[8] 119, and 120 of the Negotiable Instruments Law, noting especially the definition of an accommodation maker and the explanation of when persons on an instrument are primarily liable. From its interpretation of these pertinent provisions the court concluded as follows: "It is, therefore, clear, under the well-settled rules governing the construction of statutes, that when this act, which, in effect, declares that all persons signing a negotiable instrument shall be liable, whether executed for a valuable consideration or as an accommodation maker, and then specifies the particular manner in which negotiable instruments may be discharged, designating, as an exception thereto, that, when the liability is secondary, it may be avoided by any valid agreement extending the time of payment, etc., without such person's consent, was passed, it was the intention of the legislative assembly to make such provisions exclusive of all others."[9] Thus, the ruling was that Lyons was liable and that the law in Oregon was changed by the Negotiable Instruments Law, such being the intent of the legislative assembly.

In other words, it was the opinion of the court in the principal case that under the Negotiable Instruments Law the accommodation maker is primarily liable, and that he is not discharged by any extension of time given to the promisor, for whose benefit he became a party to the instrument, nor does the fact that the accommodation maker did not have knowledge of the extension made on the part of the plaintiffs and the principal debtor alter his obligation.

It seems to have been the court's opinion that in order to achieve uniformity, the act must be construed as far as possible without any reference to rules of law not expressed therein.[10] This attitude of the court has received little support from the writers on the subject

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[7] *Ibid.*

[8] Sec. 196 provides: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of binding his name to some other person. Such person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

[9] 49 Ore. 186, 89 Pac. 426, 428-429 (1907).

[10] See Note (1925) 38 HARV. L. REV. 954.

of suretyship and guaranty, and those who have attempted any thorough analysis of the Negotiable Instruments Law.[11]

Before reaching a final conclusion in regard to *Cellers et al. v. Meachem et al.,* let us ascertain whether the decision is at variance with the well established doctrines of suretyship. It is a generally accepted principle of suretyship that when the obligation of the surety is for the debt of the principal, if the time of payment is extended by the creditor to the principal debtor without the knowledge or consent of the surety, the surety is discharged.[12] It is based on the principle that the surety is bound only by the terms of his written contract, and if those terms are varied without his consent, it is no longer his contract and he is not bound by it. There are some exceptions to this rule of suretyship, but since those exceptions are not applicable to the facts in the instant case—if Lyons was surety—we will not deal with them here.[13]

The court denied that Lyons was entitled to suretyship defenses, reaching that conclusion through its interpretation of the Negotiable Instruments Law. However, it readily admitted that before the passage of this act the accepted rules of suretyship would have been applied and as a result Lyons would have been discharged by the extension of time.[14] The decision is therefore at variance with the well accepted rules of suretyship.

The next question is whether the court's application and interpretation of the Negotiable Instruments Law, was correct. A close examination of certain sections of that law indicates that there was some justification for an interpretation of the statute more in line with the accepted rules of suretyship.[15] In section 192 the law provides that "the person 'primarily' liable in an instrument is the person who by the terms of the instrument is absolutely required to pay the

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[11]See 1 WILLISTON, CONTRACTS (1920), Sec. 386; BRANNON, THE NEGOTIABLE INSTRUMENTS LAW (Chafee's Ed. 1926) 723; RAYMOND, SURETYSHIP AT "LAW MERCHANT," 30 HARV. L. REV. 141 (1916); Note (1907) 11 LAW NOTES 105; Note (1925) 38 HARV. L. REV. 954; (1931) 44 HARV. L. REV. 1000, "The rule has been almost unanimously criticized by writers as unnecessary and undesirable." See, also, (1928) 42 HARV. L. REV. 137, "It would seem therefore that the interpretation given by these courts to the Negotiable Instruments Law is unnecessarily strict." See, also Ousley, *Extension of Time for Payment as Releasing Sureties on Notes in Kentucky,* 22 KY. L. REV. 371 (1934).

[12]1 BRANDT, *op. cit, supra* note 4; CHILDS, SURETYSHIP AND GUARANTY (1907) 171; DE COLYAR, LAW OF GUARANTIES (3rd Ed.) 422.

[13]For these exceptions see ARANT, SURETYSHIP, 288-303; 1 BRANDT, *op. cit., supra,* note 4.

[14]For a discussion of the decisions in Kentucky as to liability, see OUSLEY, *loc. cit. supra* note 11. See, also, (1928) 42 HARV. L. REV. 137.

[15]See Note (1925) 38 HARV. L. REV. 954; RAYMOND, *loc. cit. supra* note 11, at 152-155.

same. All other parties are 'secondarily liable.' "[16] Section 119 deals with the discharging of the instruments, and does not include an extension of time to the principal debtor as a mode of discharge. Section 120 does include this as a method of discharging a party "secondarily" liable.[17] From the facts in the case it would seem that Lyons was not primarily liable on the face of the note, but was merely surety for Meachem until plaintiffs extended the time of payment. Therefore by an extension of time and additional consideration between the principal debtor and creditor, it could be reasoned that under Section 120 of the N. I. L., Lyons was discharged from Meachem's direct obligation to the plaintiffs. In *Cellers et al. v. Meachem et al.*, however, Lyons was held to be primarily liable under the court's interpretation of Section 192. The court held that a person appearing upon the promissory note as primarily liable, could not be shown to be in fact a surety; that therefore such a party was not included in Section 120. As a result of this interpretation of the Negotiable Instruments Law, the rule of the law merchant is overthrown and the surety on an instrument, who appears as the party primarily liable, can never be discharged by an extension of time granted to the party who is in fact the principal debtor.[18] This construction of the Negotiable Instruments Law has been accepted by a large number of state courts and there is little doubt that it is the majority view at present.[19] It is said that "the majority view has been severely criticized but is, no doubt, so well entrenched that only an amendment of the Negotiable Instruments Law could result in a general change in the rule."[20] There are some courts—but they are in a minority—which have construed sections 119 and 120 of the

[16]Brady, Uniform Negotiable Instruments Act, 92, Sec. 192 (1930).

[17](1930) 26 Mich. L. Rev. 929.

[18](1930) 26 Mich. L. Rev. 929.

[19]For a list of state courts following the principles laid down in the instant case see the cases collected in 48 A. L. R. 715; 65 A. L. R. 1425. See, also, Cowan v. Ramsey et al., 15 Ariz. 533, 140 Pac. 501 (1916); Hall v. Farmers' Nat. Bank, 78 Ind. App. 666, 129 N. E. 33 (1920); First State Bank et al. v. Williams, 164 Ky. 143, 175 S. W. 10 (1915); Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679 (1912); First State Bank v. Lang, 55 Mont. 146, 174 Pac. 567 (1922); Richards v. Market Exch. Bank Co., 81 Oh. St. 348, 90 N. E. 1000 (1910); Smith v. Minneapolis Threshing Machine Co., 89 Okl. 156, 214 Pac. 178 (1923); Farmers' State Bank v. Forsstrom, 89 Ore. 97, 173 Pac. 935 (1918); Bradley Eng. and Mfg. Co. v. Heyburn, 56 Wash. 628, 106 Pac. 170 (1910); Kuhn v. Groll, 118 Wash. 285, 203 Pac. 44 (1922); Baird v. Kerr et al., 254 N. W. 555 (1934); Peter v. Finzer, 116 Neb. 380, 217 N. W. 612 (1928); Finzer v. Peter, 232 N. W. 762 (Neb., 1930); Vernon State Bank v. Mangelsen, 116 Minn. 472, 208 N. W. 186 (1926); Vanderford v. Farmers' Nat. Bank, 105 Md. 164, 66 Atl. 47 (1907); Graham v. Shephard, 136 Tenn. 418, 189 S. W. 867 (1916).

[20](1930) 26 Mich. L. Rev. 930.

N. I. L. as being applicable only to holders in due course, and thus have adhered to the rule of the law merchant under the authority of Section 196.[21]

The writers think that the Oregon court in *Cellers et al. v. Meachem et al.* went too far in its interpretation, for it accepted the Negotiable Instruments Law as a codification of all the law on the subject and seemed to disregard the fact that there might be well accepted rules which were not in harmony with it. Of course, if all courts would accept this opinion it would result in uniformity—undoubtedly the Oregon supreme court hoped that this would be the case. Yet it seems that the court had to read an interpretation into the law which entirely disregarded commonly accepted rules of suretyship, nor was its construction in harmony with the generally accepted views of students of the question.[22] However, only a limited number of courts have departed from the ruling in this and similar cases.[23]

Let us examine more closely the pertinent sections of the Negotiable Instruments Law, since so many courts have held them at variance with the rules of suretyship defenses. Section 119, sentence 4, provides that a negotiable instrument is discharged by any act which will discharge a simple contract for the payment of money. Brannon, in his study of the Negotiable Instruments Law, takes the position that the discharge of a party, "who though primarily liable, is known to the holder to be a surety, by giving time to the principal debtor seems to be covered" by this part of Section 119. "But if this is not so, then, since the discharge of a surety-maker or surety acceptor by an extension of time granted to the principal by a holder with knowledge of the relation, is neither a discharge of the instrument nor a discharge of a party secondarily liable, this should be regarded as an omitted case and, therefore, to be governed by the law merchant under Section 196."[24]

Section 196 of the Negotiable Instruments Law provides: "In any case not provided for in this act the rules of the law merchant shall govern."[25] It is contended by some that suretyship is a part

[21]Smith v. Blackford, 228 N. W. 466 (S. D., 1929); Fullerton Lumber Co. v. Snouffer, 139 Iowa 176, 117 N. W. 50 (1908); Long v. Schafer, 185 Mo. App. 641, 171 S. W. 690 (1914). See cases listed by OUSLEY, *loc. cit. supra* note 11. Also, see, BRANNON, *op. cit supra* note 11, 713 ff. Cf. Howth v. J. I. Case Threshing Machine Co. (Tex. Civ. App., 1926) 280 S. W. 238.

[22]See authorities cited, *supra,* note 11.

[23]See cases cited, *supra,* note 21.

[24]BRANNON, *op. cit supra* note 11.

[25]For a discussion of this applicable section see Note (1925) 38 HARV. L. REV. 954, 956. See, also, Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679 (1912).

of the common law and is unknown to the law merchant, which is said to be a separate system.[26] To decide this question necessitates an examination of the history of English law. It has been pointed out, in this connection, that the law of mercantile intercourse grew up separately from the common law until the time of Coke and Mansfield. Then Mansfield, through his work as a jurist, succeeded in bringing about a merger of these two systems of law so that, since his time, the law merchant has in reality developed as a part of the common law.[27] A historical study thus reveals that it is a mistake to maintain that the law merchant is separate from the common law of which suretyship is a part.

Thus if this is an omitted case it would be governed by the law merchant which is a part of the common law.[28] This means that the commonly accepted principles of suretyship should have been applied and that the provisions of the Negotiable Instruments Law should have been so interpreted. That is, construing Sections 119 and 120 as applicable only to holders in due course would have resulted in an adherence to the rule of the law merchant under the authority of Section 196. There have been some courts which have followed this rule. Such was the holding in Iowa, Missouri, and Kentucky.[29]

A review of the case of *Love, Superintendent of Banks v. Clark,* 158 So. 484 (Miss. 1935), indicates that if the exact point was presented to the Supreme Court in Mississippi it would depart from the rule laid down in *Cellers et al. v. Meachem et al.*

In *Love, Superintendent of Banks v. Clark, supra,* suit was brought to recover the principal sum on a promissory note, signed by J. P. Edwards as maker, and endorsed by Clark for his accommodation. The court said, with reference to Clark's defense, that "The special plea of the appellee, as well as his instruction to the jury, proceeded upon the theory that he was relieved from liability by reasons of indulgences granted to the maker of the note by the holder

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[26]Note (1925) 38 HARV. L. REV. 954, 957, note 18. As to what is meant by law merchant, see 2 HALSBURY, LAWS OF ENGLAND, 459; cf. EVART, ESTOPPEL, 373-374.

[27]For accounts of early history of the law merchant, see 5 HOLDSWORTH, HISTORY OF ENGLISH LAW (1920 Ed.) 60; MITCHELL, EARLY HISTORY OF THE LAW MERCHANT; SCRUTTON, ELEMENTS OF MERCANTILE LAW; Burdick, *What is the Law Merchant?* 2 COL. L. REV. 470 (1902).

[28]BRANNON, *op. cit. supra* note 11, at 723 ff. See Mechanics' and Farmers' Bank v. Katterjohn, 137 Ky. 427, 125 S. W. 1071 (1910), "Our conclusion, then, is that, where the negotiable instrument act speaks, it controls; where it is silent, resort must be had to the law merchant or the common law regulating commercial paper." Quoted by OUSLEY, *loc. cit. supra* note 11, at 377.

[29]See BRANNON, *op. cit. supra* note 11, 725-730.

thereof; but there was no averment in this plea and no proof that the alleged forbearance and indulgences were for a definite period or were supported by any sort of consideration. In the case of *Thornton v. Dabney,* 23 Miss. 559 (1852), it was held that 'an extension of time by a creditor to a principal to effect the release of a surety, must be for a definite fixed period on a sufficient consideration, and without the consent of the surety.' In *Brown v. Prophit,* 53 Miss. 649 (1876), the court in effect held that no forbearance or indulgence will release a surety except one granted for a consideration passing to the creditor. In that case it was held that: 'An agreement between the holder and principal maker of a note that the latter may retain the sum due for a definite period of time, upon his promise to pay usurious interest, will discharge the surety on said note not consenting to such contract of forbearance,' and 'A contract between the creditor and principal debtor to forbear for some definite period, in consideration of the payment of usurious interest, releases the non-censenting surety, whether the interest is paid or not; but in absence of such a contract, payment of the stipulated interest will not discharge the surety, even though, because of such payment, the creditor continues his indulgence to the debtor.' "[30]

Section 2975, Code 1930, was not involved because, as the court said, "There is no contention that the notice required thereby to relieve a surety or accommodation indorser from liability was given the holder by 'the appellee.' "

One may also note *Graham v. People,* 97 So. at p. 184, 132 Miss. at p. 624 (1923) in which the court said, "That a person secondarily liable on a promissory note will be discharged by any agreement binding upon the holders to extend the time of payment or postpone the holder's right to enforce the instrument, unless made with the assent of the person secondarily liable, has been held by this court in an unbroken line of decisions beginning in the early judicial history of the state, and this doctrine is crystallized in Section 2698 of Hemingway's Code, which reads as follows:

> 'A person secondarily liable on the instrument is discharged: By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.' "

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[30]See Love, Superintendent of Banks v. Clark, 158 So. 484, at page 485 (1935).

However, the holding in *Cellers et al. v. Meachem et al.* that an accommodation maker who places the word "surety" after his signature is not discharged by an extension of time given without his knowledge or consent to the comaker stands as one of the leading decisions in the interpretation of Sections 119 and 120. It is distinctly at variance with the well established doctrines of suretyship since a surety under similar circumstances would be discharged. It is doubtful, in the writers' opinion—even in the face of numerous decisons—whether the decision is justified by the Negotiable Instruments Law. It is submitted that the Negotiable Instruments Law should be interpreted in the light of Section 196 so that the law merchant would apply and this would result in the application of the principles of suretyship. Otherwise, it would seem, since the objective of the Negotiable Instruments Law is to work for uniformity, that these sections of the law should be amended[31]—either to conform to the majority opinions, or to those writing upon the subject.

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[31]BRANNON, *op. cit. supra* note 11, at 725, suggested that the two sections be amended as follows: Section 119. "A negotiable instrument is discharged:
1. By payment in due course by or on behalf of the *person primarily liable;*
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;
3. By the intentional cancellation thereof by the holders;
4. When the *person primarily liable* becomes the holder of the instrument at or after maturity in his own right."
Section 120. "A party to a *Negotiable Instrument* is discharged:
1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;
3. By a valid tender of payment made by a prior party."

THE SQUIRE'S COURT*

My favorite cartoonist, the late J. P. Alley, made Hambone say: "It sho do take a smart man to argufy wid a woman, and if he is a *very* smart man, he won't do it." I hope I am too smart to try ordinarily to make a speech without preparation. I had no notice that I was to be called upon until I saw my name on the program. I am sorry that the Toastmaster has not been content with my "leave to print" as given me by the motion of some considerate lawyer at the meeting this afternoon. I have been told, however, that I am not expected to make any learned discourse on the great antiquity of the office of the justice of the peace, and that all that is expected of me on this occasion is to tell some "tall tales" about the practice in the courts of the justices of the peace in rural communities.

The learned justices of the peace have many questions to vex them, but the question of the jurisdiction of the court is one that does not give them very much concern. I recall a justice of the peace who was in office, and before whom I appeared, when I first started into the practice at Laurel. I will tell you about one or two of his cases. I wish I could get over to you a picture of him in his office on a hot August day when a lawyer acquaintance strolled in. In the first place, the room occupied by the justice was the anteroom or first room of a lawyer's office and had no outside opening. Needless to say, the ventilation was bad, and the equipment was poor. For a desk the justice used what was known, when Ike Stone and I were in college together, as a "wash-stand." I remember that some forty years ago, the standard price for this particular piece of furniture in Martin's furniture store at Starkville was $1.75. In addition to the "desk," if a bowl and pitcher stand may be called a desk, there were three indifferent chairs in the room. On the occasion I have in mind, the lawyer who occupied the rear office, strolled through the office of the justice of the peace, and the learned justice, who by the way could write with great difficulty and who observed the most original rules of spelling, was engaged in writing a legal looking document while a negro man and a negro woman occupied the two remaining chairs in the office and intently watched every movement of the justice as he laboriously wrote. As the lawyer entered, the justice stopped his work, and as he wiped the perspiration from his

*Speech delivered at the banquet of the thirtieth annual meeting of the Mississippi State Bar by Hon. W. S. Welch, member of the Laurel, Mississippi bar.

brow, he said to the lawyer friend: "Rufe, I swear to you, I have got the hardest job here I ever undertook." "What are you doing?" asked the lawyer. "Well, I am just giving these here negroes a divorce," replied the justice. The lawyer undertook to instruct the justice as to the jurisdiction of justices of the peace and advised that he had no jurisdiction to grant divorces. To this the justice of the peace replied: "The hell I haint. I married 'em and now I'm gwine to divorce 'em." The divorce was granted (?), and afterwards one of the parties, on being indicted at Hattiesburg on a charge of bigamy, undertook to plead as a defense the divorce granted him by the justice of the peace.

Most of the stories I know about court trials before learned justices of the peace, are stories of the cases of the late Mr. B. W. Sharborough of Laurel, Mississippi, sometimes called "the tall pine of Jasper" and Judge Stone Deavours, who was beloved by all who knew him. Although Judge Deavours was a lawyer of learning—I might say of profound learning—he had a keen sense of humor, and he rather enjoyed winning a case in a justice court by exceeding his opponent in fallacy of argument. It gave him keener pleasure to outwit his opponent by the very absurdity of his claim than it did to win by profound argument. Mr. Sharborough was no mean opponent in that kind of controversy, and he did not always come out second best. I remember a story that is told of their appearance before a justice of the peace along in March, after the justice of the peace had been inducted into office in January. Some citizen was charged with a misdemeanor committed in October of the year before. Judge Deavours was for the defense and Mr. Sharborough for the prosecution. Judge Deavours brought out the fact that the misdemeanor, if any was committed, was committed before the justice of the peace was inducted into office. He then moved the court to discharge the defendant on the ground that the justice of the peace was without jurisdiction, the crime having been committed before he, the justice of the peace, was inducted into office. Judge Deavours pointed out in a very eloquent speech that the great State of Mississippi could not expect the justice of the peace to regulate the conduct of people at a time before he was even elected to the office, and concluded his oration with an observation to the effect that the justice of the peace was wholly without jurisdiction to render any judgment other than one of dismissal.

The justice of the peace nodded his assent, and with aim that would have done credit to Buffalo Bill's rifle, spat a stream of

tobacco juice through a knot hole some ten feet away and then turned to Mr. Sharborough and said: "Squire, he's got you there." Mr. Sharborough arose and addressed the court. He said that it was a well recognized principle that Judge Deavours had undertaken to invoke; that he conceded that the sovereign State of Mississippi did not expect the justice to regulate the conduct of people or to sit in judgment on the conduct of people as to matters that had happened before he was elected to the office of the justice of the peace, but he reminded the court of what he said was an exception to the rule and that was, that on being inducted into an office, the election related back to the time of his nomination in the primary. He then said to the justice of the peace: "You know we are all Democrats down here, and last August you beat two mighty good men for this office of justice of the peace, and since that time the people of the state and of Jasper County have looked upon you as their justice of the peace, and while it is true you did not actually go into office until January first, nevertheless, your election in November was merely a ratification of what was done in the August primary, and on your induction into office on January first, you became vested with authority to dispose of any matter that happened in the jurisdiction of your court subsequent to your nomination in the primary of last August." Thereupon, the justice of the peace again effectively taking aim at the knot hole, turned to Judge Deavours and said: "Squire, he's got you there."

I enjoy a story of Mr. Barney Eaton's early practice. When Barney was admitted to the practice, he and his college school mate, A. A. Hurst, an exceedingly brilliant lawyer, opened an office at Hattiesburg. Early in their legal career, they were employed to defend a man who had refused to "work the road" or pay the computation road tax. Barney and Ab were having a rather hard time trying to make a defense for their client. The fact is, he had no legal defense, but feeling that they had to make a show of some kind for their client, they asked him a lot of irrelevant questions and finally asked the defendant where he was born. To the surprise of everybody, the defendant answered that he was born in Canada. He was then asked if he had ever become naturalized, and when he said "no," Mr. Eaton gravely arose and, addressing the court, asked that the defendant be discharged to prevent "grave international complications." Mr. Eaton said: "Now, of course, it is not the fault of any officer of the law here. It was unknown to the court; I take it that it was unknown to the constable who made the arrest that this defendant is not a

citizen of the United States, but a subject of King Edward the VII. To convict him on this charge might result in grave international complications, and result in the President of the United States having to cable our Ambassador at the Court of St. James to make apologies. I am quite sure that my client will be gracious enough to forget the matter if he is discharged by this court and due apology made to him by the court with the explanation that the officers dealing with him had no knowledge of the fact that he was a subject of his Majesty, King Edward the VII." The defendant was discharged with apologies as suggested and fortunately there were no "grave international complications" as a result. The justice then asked Eaton and Hurst if they thought it advisable that he tear the page bearing the entry from his docket, so that there would be no embarrassing proof of the unfortunate incident.

I remember another story that is told of Barney's early practice. That was before he was General Counsel for the Gulf and Ship Island Railroad, but that company was sued for the death of one yearling valued at six dollars. Ordinarily the railroad did not defend suits of this kind in the justice court, but simply sent on an appeal bond to be approved by the justice and made defense in the circuit court. However, for some reason the road wanted this suit defended, and Mr. Eaton was employed. The investigation made by the railroad company showed that the yearling in question was not killed by the operation of any train of the Gulf and Ship Island Railroad Company, but by a logging train of Eastman, Gardiner and Company, whose log trains were operated over the Laurel branch of the Gulf and Ship Island. Barney found that the justice of the peace was of counsel for the plaintiff, and every time he sought to show from cross-examination of the witnesses that the yearling was killed by the Eastman, Gardiner and Company's train instead of the Gulf and Ship Island train, the justice of the peace objected. Barney would back off and adroitly approach the subject from another angle, but the justice was alert, and every time a question came that would have brought the reply that was wanted by Mr. Eaton, the justice of the peace objected. Finally, when Barney again approached the matter and the justice objected, Barney promptly counted with "the objection is overruled and the witness will answer the question." In this manner Barney won what was perhaps the first of many cases he has won for the Gulf and Ship Island Railroad Company.

When I first commenced to practice at Laurel, more than twenty-five years ago, there were two justices of the peace in that Super-

visors' Beat. One kept his docket in the office of Mr. R. E. Halsell, with whom I was associated very pleasantly for a time. This justice of the peace was known as "Mr. Bob's justice." "Mr. Bob" had the unique distinction of never having lost a case in the court of his justice. The other justice of the peace kept his docket in the office of Col. C. R. Shannon, who was always addressed by the justice as "Mr. Charlie." I will not undertake to say that Col. Shannon never lost a case before that justice. He did take a non-suit in one case. Col. Shannon represented a plaintiff who had sued a local merchant on an open account. The account had been paid by a check, but in some way the plaintiff had overlooked giving the defendant the necessary credit. The defendant was one of those wise birds who wanted to be sued so as to get the plaintiff taxed with the costs, and he said nothing of his defense until the trial of the case. At the trial, the defendant testified that he did not owe the plaintiff anything and testified to having made the payment to plaintiff, omitting to say that it was by check. The testimony fell on unbelieving ears, so far as the justice of the peace was concerned, until the defendant produced his cancelled check with a notation on the face showing that it was in satisfaction of the very invoices on which plaintiff's suit was filed. On the production of the check, the justice of the peace looked over it very carefully and then, with a pained expression on his face, turned to Col. Shannon and said: "Well, now Mr. Charlie, what do you think about that?" Col. Shannon was granted a non-suit "without prejudice."

Up in Jasper County a somewhat similar situation existed. Judge Deavours and Mr. B. W. Sharborough were reputed to have some considerable influence with one justice, while Judge Blank, from another county, was reputed to have considerable influence with the other justice. Once Judge Deavours and Mr. Sharborough were called upon to defend an action in the court of the justice who was friendly to Mr. Blank, in which case Mr. Blank was attorney for the plaintiff. Things did not look very well for Judge Deavours and Mr. Sharborough. Word came to them that the justice was "all set" to render a very prompt judgment in favor of the plaintiff. Deavours and Sharborough sent word to their justice to be on hand, and when their case was called, they addressed Mr. Blank's justice and suggested the propriety of his asking his fellow justice to sit with him in the trial of their case. They said: "Of course, the case is pending before you and your decision will govern, but it would be a nice courtesy to extend to this brother justice of the

peace to ask him to sit with you in an advisory capacity during the trial of the case." The presiding justice demurred, saying something about the procedure being a little unusual and difficult, but Mr. Sharborough replied: "Difficult, hell, all you have got to do is just to move a little further along that bench there and ask this fellow justice of the peace to sit by you and counsel with you during the trial of the case." There did not seem to be any very good way to avoid that, so Mr. Blank's justice extended the invitation to the justice friendly to Judge Deavours and Mr. Sharborough to sit with him in the case. Deavours and Sharborough then promptly had Mr. Blank's justice of the peace sworn as one of the witnesses in the case, had the witnesses put under the rule, and tried the case before a friendly court.

On another occasion Mr. Blank appeared before a justice who was friendly to Deavours and Sharborough. Mr. Blank called for a jury. The constable belonged to Deavours and Sharborough as thoroughly as did the justice of the peace, and the jurors were not to the liking of Mr. Blank, who undertook to cross-examine the jurors rather rigidly as to their opinion and finally, in objecting to one of the jurors, the plaintiff's lawyer said: "This juror said on his voir dire examination. . . ." No sooner were the words out of his mouth than Mr. Sharborough was on his feet addressing the court and asking that Mr. Blank be punished for using such language before the justice. Mr. Sharborough said that so far as he himself was concerned, he had a strong right arm and could protect himself, but he was a friend of the court and he wanted to remind the court of the court's power to punish for contempt a man who would so far forget himself as to use language like that in the presence of the court, and more to the same effect. Mr. Blank was taken so by surprise and was so amazed that, before he could say anything, Judge Deavours was on his feet following the lead of Sharborough with a denunciation of the unseemly language of Mr. Blank, until he had the justice of the peace so wrought up that he was shaking like an aspen leaf and by the time Mr. Blank was able to half arise from his feet to address the court, the learned justice shaking a finger in his face, said: "Sit down, if you say another word, I will send you to jail for six months."

I have read recently with a great deal of interest "The Story of the Law" by Mr. John M. Zane of the Chicago bar. Mr. Zane is a very learned lawyer, and he has written very interestingly of his subject. Like other men deeply learned in the law, he likes to arrive

at a conclusion as to what was the law of say, some four thousand years ago, as determined from some fragments of letters from lawyers or from a study of some legal documents. It is all very interesting, but I am wondering what some future student of the law some thousands of years from now, finding a court judgment that I am going to give you, will arrive at as to the law of assault in Mississippi at this time, basing his opinion on the entry of a justice docket that I have had preserved at Laurel in a fire proof building housing a library and museum. It was in the case of *The State of Mississippi vs. Carr Powers* and the charge was assault. I give you the entry of the case on the justice docket as it is written. It is as follows:

"CHARGE: Assault.

JUDGMENT: this came up to be Heard & G. W. Tempels withdraw the Proscustran & Pay the cost with understanding Ben Powrs Delive to G. W. Tempels 4. Head Hoges 3 Piges & one Saw. (Sow)".

Perhaps of equal interest to some future legal antiquarian will be the case of *The State of Mississippi vs. G. D. Parker,* who was tried in a justice court at Laurel on a charge of engaging in the business of contracting without paying a privilege tax license. The entry on the docket of the *learned* (?) justice of the peace is in "words and figures" as follows:

"CHARGE: Contrackting without Liceses

JUDGMENT: this case came up to be Heard and after Hearing the evidence in the Cas the Cort Decided that the Defendent was gilty as charg the Cort Decided the Defendent was to Pay His Liceses & Cost of the Cort this 26 day of Sept. 1908 and he Stayed Comited to Jail till Fine & Cos is Payed. was dismiss by getting Gis Licenses."

CHARGING THE JURY

V. A. GRIFFITH*

For some time following the Revolution, the doctrine was recognized that the juries should be the judges of the law as well as of the facts. This doctrine had its origin out of the arbitrary and unlawful acts of the royal judges during the troubled years immediately preceding the Revolution, and which formed one of the grounds of complaint against the crown in the Declaration of Independence. But after the adoption of the federal and state constitutions, at the foundations of all of which there rested the fundamental notion that our governments, state and federal, shall be governments of laws and not of men, the doctrine that juries shall decide the law, as well as the facts, was compelled to give way in the face of the fundamental principle just mentioned, so that now, and for several generations past, the settled rule is, and has been, that the judge gives the law, and the jurors must follow the law as thus given; otherwise they violate their oaths.

The doctrine that juries may decide the law as well as the facts apparently did not receive any definite general recognition in this state, and in the the first case wherein a party had the boldness to distinctly urge it upon the court the proposition was expressly rejected.[1] In the first general judiciary act after the adoption of the first constitution of the state it was enacted[2] that "No judge of any of said courts shall charge the jury as to the weight of the evidence in any cause, civil or criminal, but such judge may sum up the testimony and declare any matter of law arising thereon."

It is clear from this statute that it was the privilege and province of the judge to declare the law, not merely to advise the jury in respect to the law. And the language of that statute was not so chosen with any obscure purpose or conception. The verdict of history is that no state in the union, in its formation and in its guidance during the first years of its existence, was blessed with greater legal learning or wiser legal perception. These men could as well see then, as it is seen now, that to permit juries, unlearned in the law, to decide the law would place them above the

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[1]Williams v. State, 32 Miss. 389, 396 (1856).

[2]Sec. 144, Act of June 28, 1822.

constitution, above the enactments of the legislature, and above the decisions of the Supreme Court; and that all of these could be set at naught by the verdict of a jury, unless the law be declared by the judge, and thus be subject to review on appeal. It was as well perceived then as now that it could not be permitted that, by the device and under the guise of the verdict of a jury, the law of the land be altered or amended or disregarded.[3]

But a curious thing happened in 1830, only eight years after the enactment of the first general statute in 1822. On December 16, 1830, there was enacted a statute, the third section of which reads as follows:[4] "For the better preservation of the sanctity of the right of trial by jury, no judge or justice before whom any issue or issues of fact may hereafter be tried by a jury shall sum up or comment on the evidence properly and legally before said jury; nor shall said judge or justice charge said jury on points or principles of law applicable to the case before them, unless the parties to such issue or issues, or the counsel, differ in opinion as to the same, or unless one of the parties to said issue or issues shall ask the charge of said judge or justice upon some point or points of law, pertinent to such issue or issues, which shall be distinctly specified by the party asking such charge." After the adoption of the Constitution of 1832, the statute was re-enacted on March 2nd, 1833 so as to read as follows:[5] "For the better preservation of the sanctity of the right of trial by jury pure and uninfluenced, no judge before whom any issue of fact may hereafter be tried shall sum up or comment on the evidence, nor shall said judge charge the jury on points or principles of law applicable to the case before them unless the parties to such issue or counsel differ in opinion as to same; or one of the parties or counsel shall ask the charge of said judge to be given upon some point in controversy in said issue, which shall be distinctly specified in writing by the party asking such charge; and the judge shall charge to no other point than that to which his opinion is required."

There was no purpose in those enactments to revert to the conception earlier recognized in some jurisdictions that the jury should thereby be authorized to adjudge the law. The purpose was none the less that the jury should follow the law as given by the court, but the court should be limited in so doing to the points deemed material and pertinent by the parties or their counsel, and that the

[3]Dow v. Town of D'Lo, 169 Miss. 240, 247, 152 So. 474, 475 (1934).
[4]Hutchinson's Code, p. 886.
[5]Hutchinson's Code, p. 888.

judge should be wholly excluded from any comment on the facts. Various explanations have been found among contemporaneous commentators as to the cause or causes which inspired the last quoted enactments. They were not only then peculiar to this state but, in the form which the statute now exhibits, remain peculiar to this jurisdiction. A leading American author, Thompson, in his book *Trials,* has denominated them[6] as "judicial nonsense." It has been said that the judges occupying the bench in this state in 1830 were so ignorant of the law, or else holding their positions by life tenure as they did then, they were so arbitrary and partisan in their charges, that they could no longer be endured without the restraints put upon them by these enactments. But an examination of the opinions of these same judges published in Walker's Reports will refute the charge of ignorance, and the later biographical reviews by distinguished lawyers who had personal knowledge have gone far to dispute the general charge of arbitrariness and partisanship, although the accusation was perhaps, to some considerable extent, true as to two of those early judges.

The better explanation is that in the five or six years next preceding the Constitutional Convention of 1832 there had been a great awakening or revival in this state of the spirit of a purer democracy. This movement was general at that time throughout the country, and particularly in the states and territories west of the original thirteen states. Our first constitution, the constitution of 1817, contained many features which, while regarded as strictly orthodox at that time, soon gave rise to criticism and to a determination to remove all such features. One of these was the provision that the judges should be appointed for life, or during good behavior. The resentment against this provision operated so strongly to swing the pendulum that the Constitution of 1832 not only limited the judges to short terms,[7] but made them elective by the people.[8] This was the first among the constitutions to embark upon this plan of selection. This was the spirit which made possible the enactments of the peculiar statutes above quoted.

As to criminal trials the statute remained unchanged until the Code of 1857. And in a criminal case,[9] it was held that under the statute it was error for the trial judge to give any instruction not requested, although the instruction given without request be in every

[6]Vol. 2, p. 1700, note 4.
[7]Art. IV, Secs. 2, 11, 16, 18, 23.
[8]Art. IV, Secs. 2, 5, 11, 16, 18, 23.
[9]Williams v. State, 32 Miss. 389, 396 (1856); cited note 1 *supra.*

respect accurate and pertinent. It is evident, however, that experience, in not a great while, disclosed that the statute was not working altogether well in civil cases, for on March 3rd, 1846 the following statute was enacted:[10] "In the trial of all civil suits in the circuit courts of this state, the judges of said courts, when the counsel or attorneys differ as to the law, shall give instructions or charge the juries on the points or principles of law applicable to the case either before or after the argument, or both, when requested to do so by either party; and the said judges shall not give any instructions or charge until the same are first reduced to writing; and when so reduced to writing they shall be given or refused, in the words and figures so written, and if the judges shall alter, change or give other charge or instruction than those asked for by the parties such charge, alteration or other charge or instruction shall be first reduced to writing and read by the judge to the jury; and in no case shall any judge give oral or verbal charge or instruction, but all charges or instructions shall be written and read to the jury, unless by consent of both parties; and the juries shall in all cases, at the request of either party, take the charge or instructions given by the judge to their room; and when charges or instructions are given or refused, as aforesaid, the same shall be noted by the clerk at the time as given or refused, and shall be when so noted or endorsed, a part of the record without any bill of exceptions. . . . That said judge shall give any charge that he may deem necessary for the better administration of justice, whether requested to do so or not provided he render the same in writing."

Attention is particularly called to the concluding sentence of the statute just quoted. It contains the principal point to which this present discussion is directed, as will later appear. By Article 161, Chapter 61 of the Code of 1857,[11] all the previous statutes on the subject were revised and consolidated into one section which reads as follows: "No judge, in any case, civil or criminal, shall sum up or comment on the testimony or charge the jury as to the weight of evidence, but it shall be lawful for the judge to charge the jury upon the principles of law applicable to the case at the request of either party: Provided, that all instructions asked by either party shall be in writing, and all alterations or modifications of instructions given by the court to the jury, or refused, shall be in writing and may be taken out by the jury on their retirement; the clerk having

[10] HUTCHINSON'S CODE, pp. 893-4.
[11] P. 504.

first marked all instructions asked by either party or given by the court as being given or refused, as the case may be, and all instructions so marked shall be a part of the record, on appeal or writ of error without a bill of exceptions." With some alterations and rearrangement in language, but with no substantial difference in substance, the same statute was re-enacted in all our subsequent Codes.[12]

Under the statute of 1857, and the substantial rescripts thereof in all subsequent codes, it has been the uniform holding of the Supreme Court that there is thereby denied to the trial judge the power of originating and giving independent instructions of his own motion, not called for or rendered necessary by those requested by counsel, although as stated in *Watkins v. the State,*[13] the power of modification given by the statute may be exercised by the giving of a new instruction drawn by the judge, provided that the instruction so drawn and given be "supplementary and amendatory of those asked, pointing out the limitations and qualifications on the doctrines announced, as by annexing qualifying words to those asked." And with equal uniformity the decisions have been to the effect that no error can be assigned on appeal because of the failure of the trial judge to give an instruction not requested, although the omitted proposition be upon a vital issue in the case;[14] and this remains true even when one side or the other, or both sides, submit the case without any instruction at all upon any of the salient issues of law involved.[15]

It is at once to be seen, therefore, that the statute places it within the power of the parties to constitute the jury as the judge both of the law and the facts, thereby returning the procedure in such cases to an actual revival and enforcement of the long repudiated doctrine that the jury shall decide the law; and thus the historical inquiry arises whether the legislatures in omitting the concluding provision of the Act of 1846—"that the judge shall give any charge that he may deem necessary for the better administration of justice whether requested to do so or not, provided he render the same in writing"—did so with a deliberate design, fully foreseen, that there should be a potential revival of or return to the said long repudiated doctrine.

A reasonably diligent search has failed to disclose any dependable contemporaneous discussion touching upon the omitted feature; but

[12]Code of 1871, Sec. 643; Code of 1880, Sec. 1714; Code of 1892, Sec. 732; Code of 1906, Sec. 793; Code of 1930, Sec. 586.
[13]60 Miss. 323 (1882).
[14]R. R. v. Simmons, 153 Miss. 327, 338, 121 So. 144, 146 (1929).
[15]J. C. Penney Co. v. Evans, 160 So. 779 (1935).

the general judicial history including the elaborate biographical reviews of the bar in the late fifties would indicate that the omission was because the insertion of the quoted provision was no longer deemed necessary. Law libraries had at that time become generally available, and the bar was filled with lawyers of eminent ability and industry. Cases were no longer being tried on the run, but with deliberate preparation, so that the uniform practice had become such that counsel for both sides did not fail to prepare and present instructions which fairly covered the case. So the practice continued to be until within the last few years. But lately there has arisen, and has been exhibited, a disposition in many cases, particularly in personal injury cases, to omit instructions on the really vital and controlling points of law in such cases, and to submit the legal issues, as well as the issues of fact, to the jury without any guide to the jury upon the determinative points of law. Thus, in such cases, the practice has retrograded to the point where many of the states stood one hundred years ago—but then only for a short while—and to a point which has never heretofore been regarded in this state as sound or properly tenable in legal procedure.

In defense of this retrogression it is urged that when a case is submitted to the jury without instructions, or with only a part of the pertinent legal issues covered, it is so done with the consent, in effect, of the parties, since any party is privileged to request instructions covering every legal phase of the case, and that the parties ought to be at liberty to submit a case to the jury as judges of the law as well as the evidence, exactly as the parties are at liberty to submit their cause to arbitration. This argument would seem to possess considerable strength when only casually considered. But several fallacies lurk within it. An arbitration is purely a private arrangement privately conducted for the equitable and convenient private adjustment of a particular controversy, with and in which the public has no interest, and the parties may conduct the same in any such manner as to them and the arbitrators may seem just and proper. The parties may agree upon the law which shall guide the arbitrators, although it may not in fact be the law. But in a public trial in a court of justice, the public as well as the parties have an interest, wherefore it is the established rule of modern judicature everywhere that in a public trial the parties are not permitted to agree on the law so as to bind the court.[16] The parties, therefore, may not agree on an erroneous instruction, and thereby oblige the court to

[16]Jones v. Madison County, 72 Miss. 777, 793, 18 So. 87, 88 (1895).

give it. Within the same reasoning it follows that the parties should not be permitted to agree that the jury, unlearned in the law, shall adjudge the law with such large chances that it will be done erroneously, because the interest involved goes beyond that of the parties; because the decision of the jury is a judicial decision which may be looked upon as a general judicial precedent, for all similar cases, in the eyes of all the public who have witnessed the public proceeding in the public temple dedicated to justice under the substantive law of the land.

Moreover, the true and defensible conception of an arbitration is a proceeding wherein the arbitrators have consented to so act. Jurors have not consented to act as mere arbitrators. On the contrary, they know that their function is to apply the facts to the general and uniform law of the land which is alike the present and future protection and safeguard of all persons, including every individual member of the jury. Therefore most, if not nearly all, honest juries will earnestly desire to know from a competent and authoritative source, learned in the law, what the precise law of the case is, so that they may truly and properly return a correct legal verdict. There is no practitioner of long experience who has not witnessed occurrences when juries appealed in vain for further instructions; and none who has not heard jurors complain that they were obliged to grope in the consideration of a case, in doubt as to what was the law upon essential issues and as to which their instructions were silent. It is a definite duty owed by the parties to the jury to request instructions covering the case, and when the parties choose to omit compliance with that duty, it would seem plain that the trial judge should then be privileged to supply the omissions, and to perform this obvious duty to the jury as to the vital legal issues involved.

Again, there is to be pointed out the cases of infant parties and others under disabilities in respect to whose interests it is the settled and universal law that the court is under duty to see that their interests are protected; likewise in cases where the interests of the state and its political subdivisions are involved.[17] There are also the cases wherein parties charged with crime less than capital are unable to employ counsel. Although the interests of such parties may be turned at large by reason of the failure to request instructions upon the law, the court is powerless to intervene, except simply to refuse to submit the case at all to the jury and to enter a mistrial and a continuance, unless instructions covering these interests are prepared

[17]State v. Woodruff, 170 Miss. 744, 778, 150 So. 760, 766 (1933).

and requested; but this power of the judge to refuse to submit the case would not take care of every contingency, as may readily be seen; besides it is a power which the trial judge will be extremely reluctant to exercise, although that it ought to be done in many cases is hardly subject to fair debate.

But the whole matter rests upon the fundamental foundation that "courts are organized and exist for the correct administration of justice."[18] "The object of a judicial trial is to enable the state to establish and enforce justice between party and party."[19] The justice that is referred to in these fundamental declarations is judicial justice according to the substantive law of the land, and under general and uniform rules; not that which may accord with the equitable individual notions, as to the law, of twelve men who may happen to be on a jury, and which might be the exact reverse, in notions of law, of those of twelve other men in the same case.

The point is—and the object of this paper is to provoke thought and perhaps discussion upon it—whether, in view of the recent departures from correct practice in the matter of requests for instructions, it would not be better to reinstate in the section dealing with this subject, the provision contained in the last sentence of the Act of 1846, "that the judge shall (or may) give any charge that he may deem necessary for the better administration of justice, whether requested to do so or not, provided he render the same in writing." Would not such a restoration to the present statute operate effectively to incite counsel to fairly cover the case by instructions prepared by them and submitted to the court, and thus put an end to the practice of submitting cases without instructions, or with instructions covering only particular parts of the case, omitting other vital legal issues?

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[18]Moore v. Sykes Estate, 167 Miss. 212, 219, 149 So. 789, 791 (1933).

[19]Kress Co. v. Sharp, 156 Miss. 693, 710, 126 So. 650, 655 (1930); Beard v. Williams, 161 So. 750 (1935).

PROPOSED CHANGES IN MISSISSIPPI PROCEDURE

JOHN B. BRUNINI*

This article is not intended to be learned, nor technical, nor exhaustive. Many thought that the proceedings of the bar at Natchez were very much enlivened by the controversy over President Everett's effort to upset the elective judiciary in part, and gave further expression that these open discussions should be encouraged.

The writer will undertake to place himself in the attitude of a layman, rather than that of a lawyer, in the hope that he may be contributing a few suggestions for consideration by the members of the bar that might eventuate into something constructive.

PROPOSAL ONE

The late Chalmers H. Alexander, one of the leaders of the bar of this State, at the first meeting at Gulfport after the reorganization of the association, urged upon the members that a rule be adopted, wherein our appellate court should ignore all errors in instructions that were not specifically excepted to in writing by the complaining party at the time of the granting or refusal of the instructions by the trial court.

The proposal was defeated, particularly on the ground that the client of the young lawyer would suffer by such a rule, as the older lawyers would have a tremendous advantage in knowledge and experience. But it was pointed out, granting for the sake of the argument that such was true, that the disadvantage was only one of many that the client of the young lawyer might suffer, and that the fact was that in every step towards the prosecution or defense of a case the same disadvantage would still exist. The experienced capable lawyer has the advantage over the young and inexperienced or less talented trial lawyer, in the first consideration of the case, in the development of the facts and of the law, in the examination and cross-examination of witnesses, in the preparation of the instructions, in the arguments to the court and to the jury, in the preservation of the exceptions, in the preparation of briefs, and in the oral arguments in the appellate court. So, why single out one step, or one factor,

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to protect the young or less talented lawyer against his experienced or talented or older brother?

Undoubtedly, in the interest of the expedition of settling rights of litigants, a trial judge should have the benefit of counsel, to keep from granting or refusing erroneous instructions. It is a mistake, however, to assume that the younger lawyer, in all instances, is inferior in trial work to his elder brother. It is needless to say that age may help in experience but not in mentality or talents.

The fact is that, irrespective of age, the talented trial lawyer has the advantage of his adversary, less talented. John Quincy Adams, in his eloquent address on "The Ancient Masters of Eloquence," says:

> "In judicial controversies the conflict of rights are to be decided by the conflict of talents."

Whether or not, that should be the case, it is eminently correct, in the opinion of this writer, in the vast majority of the cases which are at all close.

The practice in the federal courts requires the complaining party, while the judge is orally charging the jury, or immediately thereafter, to specifically except to the supposed erroneous charge. It takes real talent to do that well—not only talent, but a full knowledge of the law and of the facts. That rule should make the young advocate a better lawyer and a more successful one, much to the benefit of his client and to the court. In order to be properly equipped, the young lawyer should be trained in every way, not only to know the facts, but also the law of his case, before he enters upon the trial of it, in order to put himself more nearly upon an equal footing with his more talented or elder adversary.

So, it is proposed that such a rule be established, either by ruling of our state appellate court, or by proper legislation.

PROPOSAL TWO

In Louisiana the appellate court reduces an excessive verdict to what, under all of the facts and circumstances, is fair and reasonable, and increases an inadequate verdict to what is fair and reasonable.

The rule in our court is to reduce an excessive verdict to what our court believes to be fair and reasonable, but it does not give the court the right to increase an inadequate verdict to what it thinks fair and reasonable. Is there any logic in the discrimination?

The power to increase inadequate verdicts should be given to our courts.

PROPOSAL THREE

In Louisiana the statute of limitations on personal injury cases is one year. Certainly there is no rhyme nor reason in having the statutory limit set at six years in similar cases arising in Mississippi. There are instances where witnesses die off or depart the realm, and the plaintiff, who had no case in, say, the first one or two years, by the death or departure of the witnesses, has one in the fourth, fifth, or sixth year.

The Mississippi statute should be amended, fixing the time at either one or two years. The injured party would not thereby be unjustly or unreasonably deprived of any of his rights by doing so.

PROPOSAL FOUR

Our State Supreme Court has, within the last three, four, or five years, made definite and specific rules, in aid of the bar, as to just what must be done in certain instances. This has been a very valuable contribution to our practice.

One such suggestion was that the Supreme Court should decide all of the questions at issue in the first appeal, rather than make successive rulings. For instance, in the case of *Green et al. v. Board of Supervisors of Adams County,*[1] our Supreme Court reversed the case because the jurisdictional facts did not appear in the order of the Supervisors, and declined to pass upon the second ground, to-wit: That the record conclusively showed that there was no "county ferry," which was necessary in order to make the act applicable. Thereupon the Supervisors started over again by incorporating the jurisdictional facts in its order. The case went back to the Supreme Court, and it thereupon held that the act did not apply to Adams County because there was no "county ferry" existing in the county.[2]

It will be argued, of course, that under the practice, the Supreme Court was right to reverse the case without considering the other issues, because the supervisors failed to show jurisdiction of the subject matter. But to the layman it would appear that the court should have decided both issues of the controversy in the first appeal and thus saved a second effort of the supervisors of Adams County to come within the terms of the act, and that it took up unnecessary time and made unnecessary expense both to the courts and to the litigants. Certainly it would save expense to the litigants and to the counties and shorten the labors of the courts.

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[1]172 Miss. 573, 161 So. 139 (1935).
[2]163 So. 121 (1935).

PROPOSAL FIVE

Attention has been drawn to the case of *I. C. R. R. Co. v. Humphries,*[3] an action for damages for the death of one Tom Humphries on November 9, 1931 by the alleged negligence of the Railroad Company. A verdict for $50,000.00 was recovered. The case was affirmed on liability, but reversed and remanded on damages, the Supreme Court holding, however, that the record was so confused on this question that it was unable to fix the amount. The verdict of $42,500.00, recovered on the second trial, was recently reversed and remanded for another trial on the question of damages. The court itself was divided on some of its rulings.

To the layman the question arises: Should there not have been some way for the Supreme Court itself to have determined what was fair and reasonable on the first appeal? Of course all know that our court was proceeding orderly and according to rule. But the layman's view is: Why should there be such a rule, to delay the final decision interminably? The layman is horrified when he is told that the Railroad Company, doubtless, will appeal the case to the United States Supreme Court, since the Federal Employers Liability Act is involved, and wonders how long it is going to take to get a final decision in our State Courts, and how much longer it will take to get a final decision in the United States Supreme Court. Will not the complaining parties be worn out and become rebellious and discouraged with these long delays? Is not the effect to make litigants sacrifice their interests rather than to go into the courts?

It is a well known fact that the mercantile interests in the City of London, some years back, determined that the trial of their cases was so expensive, burdensome, and prolonged that they set up a court of their own by agreement. In that court the parties came with their witnesses and record evidence, and within a few days the whole matter was determined. The business of the regular courts was depleted, and in order to get this litigation back into the courts, they made the presiding arbitrator of the commercial court a member of the regular court—although he was not a lawyer—thus incorporating the methods of his court looking to expedition.

PROPOSAL SIX

Suppose Brown, a resident of Corinth, Mississippi, negligently runs over Smith in Gulfport, Mississippi, Smith being a resident of

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[3]170 Miss. 840, 155 So. 421 (1934).

Harrison County. A half hour before or a half hour afterwards, Brown murders Thomas.

Smith is compelled to sue Brown in Corinth for his injuries, entailing quite a bit of expense and trouble to go from his home to Corinth with his witnesses. Brown must stand trial in Harrison County for the murder of Thomas.

Why should not the venue in the personal injury civil suit be fixed either in Harrison County, the place of the wrongful act, or in Corinth, giving the injured the right to select the place of trial?

PROPOSAL SEVEN

Under the federal practice, questions not going to the merits of the case, but in bar, are tried first. For instance, questions involving the statute of limitations, jurisdiction, the pendency of other cases, etc. In the writer's opinion, the state practice should conform to the federal practice in that respect.

PROPOSAL EIGHT

Section 736 of the Mississippi Code provides:

> "The judge of a court shall not preside on the trial of any cause where the parties, or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, or wherein he may have been of counsel, except by the consent of the judge and of the parties."

That section should be amended so as to read as follows:

> "JUDGE NOT TO SIT WHEN INTERESTED OR RELATED.—The judge of a court shall not preside on the trial of any cause or sit on appeal thereof, where the parties, or either of them, or the lawyers, or any of them, or the members of their firm or their lawyer employees, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, or wherein he may have been of counsel."

PROPOSAL NINE

Provision should be made for an appeal by one whose verdict has been set aside and a new trial awarded, should he desire to do so. Why should the winner of a case be required to go through a second trial when the first trial, if the judgment is affirmed in the Supreme Court, would settle the controversy?

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NOTE AND COMMENT

CONSTITUTIONAL LAW — EQUAL PROTECTION OF LAWS — EXCLUSION OF NEGROES FROM JURY SERVICE — EFFECT ON DEFENDANT'S RIGHT TO A NEW TRIAL.

The decisions of the Supreme Court of the United States in the Scottsboro cases,[1] decided in April of this year, have occasioned alarm throughout the southern states entirely out of keeping with their significance. Newspaper notoriety attending the trials of the nine Negro boys charged with raping two transient mill girls on a freight train in Jackson County, Alabama, and the offensive activities of communistic organizations and Negro agitators in the north, who staged demonstrations protesting the prosecutions and convictions, have been seized upon by misguided critics to present the opinions rendered by Chief Justice Hughes as a new threat to "White Supremacy."

In reality, the decisions afford no basis for alarm among the white population of the southern states. Only by force of the grossest misinterpretation can they be imagined to constitute any danger to our present court system, and they certainly afford no grounds for fear of Negro dominance of our courts, or for promiscuous jury service by Negroes. The decisions merely reiterate that no defendant, regardless of color, is to deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution. The Supreme Court repeats propositions of law firmly established by a long series of cases extending over several decades. It insists that the protection guaranteed by the Constitution be extended to the instant defendants, just as it has always insisted that there be no violation of constitutional rights, either by express legislation, or by the acts of officials. The rulings announce no startling doctrines and establish no new or dangerous precedent.

The Supreme Court had reversed a prior conviction of the same defendants in 1932, on the ground that they had been denied due process of law by the trial court of Jackson County, Alabama.[2] Demonstrations of popular prejudice throughout the trial and failure of the trial court to make an effective appointment of counsel for the defense, were grounds for this reversal. A motion for a change of venue was granted after the remand and the cases were transferred to Morgan County. A motion was made to quash the indictment found in Jackson County, on the ground that Negroes had been excluded from service on the grand jury which found the indictment. The trial court denied this motion. Another was made

[1]Norris v. Alabama, 79 L. ed. 598 (1935), and Patterson v. Alabama, 79 L. ed. 605 (1935).

[2]Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A. L. R. 527 (1932).

to quash the trial venire, on the same ground of exclusion. This was also denied, and exception was taken to both rulings. The motions charged that there had been "long continued, systematic and arbitrary exclusion of qualified Negro citizens from service on juries, solely because of their race and color, in violation of the Constitution of the United States" in both counties. The court heard evidence on the charges. After denial of the motions, the cases proceeded to trial and the defendants were convicted and sentenced to death. Appeals were taken to the Supreme Court of Alabama, which affirmed the convictions.[3] A writ of certiorari was granted by the Supreme Court of the United States, upon which the judgment of the Alabama court was reviewed.[4]

The indictments were found by a grand jury which convened in 1930. The Alabama law prescribes that "all male citizens" not generally disqualified by the statutes be placed upon a jury list by jury commissioners of each county. Those serving on grand and petit juries are then chosen from this list. The statute excludes no one on account of race, color, or previous condition of servitude. Both the Supreme Court of that state and that of the United States expressly recognizes that the statute is constitutional on its face and not open to objection as denying the equal protection of the law, if fairly and honestly administered.[5] The grand jury in the instant case was called from the male population of Jackson County. Unrefuted testimony showed that the county's population of 36,881 included 2,688 Negroes. There were 8,801 adult males in the county, of whom 666 were colored. There were no Negroes on the jury.

In 1881, on appeal by a Negro convicted of rape in the state courts of Delaware,[6] the Supreme Court of the United States held that it would reverse a conviction because of the improper administration of a state statute, when the defendant was deprived of the equal protection of the laws by the acts of the administrative officers charged with the execution of the law. This was true even though the express provisions of the law did not violate the Constitution.

That case was strikingly like the two under consideration here. A Negro had been convicted of rape by a jury from which Negroes had been excluded. The case could have been removed to the federal courts if the *provisions of the state law* precluded the equal protec-

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[3]156 So. 556 (1934).

[4]293 U. S. 552, 55 S. Ct. 345 (1934).

[5]Section 8603 of the Alabama Code of 1923: "The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over sixty-five years of age, or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness, is unfit to discharge the duties of a juror, or who cannot read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box."

[6]Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567 (1880).

tion of the law. The United States Supreme Court later ruled that the state court acted properly in denying such a motion. The Supreme Court held that a fair trial might be had under the proper administration of the Delaware law, since the courts of that state had previously adjudicated that laws in conflict with the Federal Constitution were invalid and inoperative. The evidence showed that Negroes had been deliberately and systematically excluded from the grand and petit juries of Delaware over a number of years, although there were many Negroes eligible and available for jury service. The court strongly denounced the "violent presumption" indulged in by the state court that there were no Negroes in Delaware qualified in character to serve on juries. The court ruled that upon proof of such general exclusion of Negroes, a strong *prima facie* case of intentional discrimination against Negroes was made out. A presumption of unlawful discrimination arose, whether the Negroes were excluded by legislative act, by rulings of the judiciary, or by the acts of officers charged with drawing up the jury lists. Deliberate exclusion of Negro jurors from participation in the trial of an accused Negro denies the equal protection of the law as guaranteed by the Fourteenth Amendment, even though Negroes are not expressly mentioned in that Article. In the Neal case the court adheres to the stand it took in several earlier cases.[7]

In the same case the court made it plain that it would review the record in cases wherein a claim of denial of equal protection was made, in order to make a finding of fact as to whether or not there had been such privation of a federal right as to warrant reversal. Since that time the court has held repeatedly that a ground for reversal may be afforded by the acts of jury commissioners in executing jury laws, even though the laws are wholly valid in themselves, and that it is the province of the court to inquire into the record to determine whether constitutional rights have been denied by the acts of administrative officers.[8]

In its decision affirming the conviction of the defendants in the Scottsboro case, the Supreme Court of Alabama recognized that a federal right would be denied if qualified Negroes were deliberately excluded from jury service. It repeated the established principle that the Fourteenth Amendment of the Constitution was violated when Negroes were excluded, because of their race and color, from sitting on a jury trying an accused Negro. Moreover, the holding of that court, that the burden of proving such discrimination lay upon the accused, was entirely correct. Only when such illegal exclusion of negroes has been proved, should a trial court sustain a

[7]Strauder v. West Virginia, Virginia v. Rives, Ex parte Virginia, 100 U. S. 303, 313, 339 (1879).

[8]Carter v. Texas, 177 U. S. 442, 44 L. ed. 839, 20 S. Ct. 687 (1899); Rogers v. Alabama, 192 U. S. 226, 48 L. ed. 417 (1904); Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 S. Ct. 904 (1896); Williams v. Mississippi, 170 U. S. 213, 42 L. ed. 1012 (1898); Martin v. Texas, 200 U. S. 316, 50 L. ed. 497, 26 S. Ct. 338 (1906); Thomas v. Texas, 212 U. S. 278, 53 L. ed. 512, 29 S. Ct. 393 (1909).

motion to quash an indictment or a trial venire. The decision of the United States Supreme Court expressed approval of the holding of the Alabama court that an accused Negro may not claim as a matter of right that members of his race shall sit on the jury before which he is tried. The mere absence of Negroes from the grand jury or the trial venire and the fact that either is composed solely of members of the white race, does not afford ground for a reversal of a conviction. It is the duty of the trial court to quash the indictment or the trial venire only when it is convinced from the evidence that there has been a deliberate and wilful exclusion of qualified members of the defendant's race. The Supreme Court of the United States is in accord with the further ruling that the Constitution has not been violated if the jury commissioners fairly and honestly endeavor to discharge their duty, and do not in fact discriminate against the Negro race. This is true, even though no Negroes happen to be called for service on either the grand or petit jury. Both courts acknowledge that jury commissioners are vested with a wide discretionary power, and that their function is necessarily quasi-judicial.

The Supreme Court of the United States disagreed with the refusal of the Alabama court to review the conduct of the jury commissioners of both Morgan and Jackson counties, to determine whether there had been discrimination against Negroes. The state court held that the conduct of the commissioners in the discharge of their duties was "not subject to review, in the absence of the abuse of discretion or fraud." It was on this ground that the decision of the Alabama court was reversed and the cases remanded for new trial.

The United States Supreme Court called attention to the well recognized principle that "when a federal right has been set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms, but also whether it was denied in substance and effect." The court pointed out that in the cases under consideration, the conclusion of law reached by the state court was so intermingled with a finding of fact that the latter controlled the former. An examination of the evidence was necessary to determine whether a federal right of the accused had been violated. The examination of the record by the court was justified by abundant authority.[9]

The record revealed convincing testimony in support of the motion to quash. County officials and disinterested private citizens, who had lived in the county from fifty to seventy-six years, testified that no Negro had ever served on a grand jury or petit jury in Jackson County, and that none had ever been placed on the lists from which

[9]Creswell v. Grand Lodge, K. P., 225 U. S. 246, 56 L. ed. 1074, 32 S. Ct. 822 (1912); Northern P. R. Co. v. North Dakota, 236 U. S. 585, 58 L. ed. 735, 35 S. Ct. 429, L. R. A. 1917E 1148, P. U. R. 1915C 277, Ann. Cas. 1916A (1915); Ward v. Love County, 253 U. S. 17, 64 L. ed. 751, 40 S. Ct. 419 (1920); Davis v. Wechsler, 263 U. S. 22, 68 L. ed. 143, 44 S. Ct. 13 (1923); Fiske v. Kansas, 274 U. S. 380, 71 L. ed. 1108, 47 S. Ct. 655 (1926); Ancient Egyptian Arabic Order v. Michaux, 279 U. S. 737, 73 L. ed. 931, 49 S. Ct. 485 (1928).

such juries were chosen. The Supreme Court ruled, as it had done in *Neal v. Delaware,* that this created a *prima facie* case of discrimination when accompanied by a showing that there were qualified Negroes in the county.

However, it should be kept in mind that this presumption arose under the Alabama jury laws, which required the commissioners to place on the jury lists "all male citizens between twenty-one and sixty-five years of age," who were not disqualified by the general disabilities specified by the statute.[10] This *prima facie* case was bolstered by direct testimony that there were a number of Negroes qualified for jury service in the county. More than thirty qualified Negroes were identified by name. Examination of the jury lists, supported by conclusive testimony, showed that no Negroes were included in the lists at the time the indictment was found. Satisfactory evidence revealed that the lists had since been tampered with and the names of Negroes added at a later date.

On hearing of the motions, the prosecution took the position that the naked fact that no Negroes were listed was not of itself proof that they had been excluded because of race or color. The Supreme Court of the United States ruled that the presumption made out a *prima facie* case of deliberate exclusion, placing on the prosecution the burden of rebuttal. The only evidence offered in contradiction to the presumption was the testimony of one jury commissioner that no Negroes had been excluded because of race or color. He testified that no such objection could have been voiced, since no Negroes had been considered as to qualifications. The court concluded that the commissioners had deliberately disregarded Negroes, which was the equivalent of active discrimination. The only other testimony offered in opposing the motion was that of a local publisher. He testified that he did not know of a single Negro in the county whom he considered qualified by character and intelligence to serve as a juror. The court did not attach any value to this testimony when faced with the direct testimony offered by the defendants.

The testimony as to the discrimination charged was practically the same in regard to both Jackson and Morgan counties. The proportionate Negro population of Morgan County, where the trial was held, was even larger than that of Jackson County, and the evidence showed that no Negro had been listed as a juror there for more than thirty years. Not only precedent recognized for many years, but sound reason and common honesty of purpose as well, justified the court's ruling that Negroes had been discriminated against by the courts of Alabama. Such discrimination constituted a clear violation of the rights of the Negro defendants, as guaranteed by the Fourteenth Amendment as interpreted by every court which has considered the question. In view of the facts, the ruling and the reversal were inescapable.

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[10] ALA. CODE (1923), § 8603.

Under the present jury laws of Alabama, compliance with the Supreme Court's ruling will require that Negroes be placed on the jury lists. A portion of them are among

> "all male citizens . . . generally reputed to be honest and intelligent men and esteemed in the community for their integrity, good character and sound judgment."

The Alabama statute requires the jury commissioners to place all such citizens on the jury lists from which the jurors will be called. The statute places a positive duty on the commissioners, and their failure to place every qualified citizen on the lists which they compile is a violation of the state law.

However, this will not cause any serious embarassment to the judiciary, the bar, or the officials of that State. An occasional Negro will sit on a grand jury. One or two will be called on a trial venire from time to time, and will then be excused for cause or challenged peremptorily. Both sides will be equally anxious to excuse Negro jurors, because of their notorious unreliability, and the Negroes called will hardly be eager to involve themselves in controversies in which white litigants or officials are interested. The ease with which the requirement is being met was illustrated in the recent reindictment of the Scottsboro defendants. A single Negro sat on the grand jury which returned two true bills against each of the defendants. His presence on the jury did not hinder the finding of the indictments in any way.

In Mississippi, the decisions will present even less difficulty than in Alabama, because of constitutional and statutory provisions. In Mississippi, the statute provides that the jurors shall be drawn from among the qualified electors of the county.[11] The ratio of Negro qualified electors to white qualified electors is variously estimated as between one to five hundred and one to fifteen hundred.[12] One to one thousand may be taken as a generous estimate. In the light of these comparative figures, it is readily apparent that the odds are overwhelmingly against Negroes serving as jurors, even if all qualified electors were called for service. Largely through the foresight and sagacity of the late Hon. J. Z. George, the Mississippi Constitution of 1890 securely guards against the registration of Negroes in large numbers. Its provisions relating to the prerequisites to registration as an elector, impose the following requirements:[12] Two years of residence in the state; one year of residence in the election district; payment of all taxes for the preceding two years (the applicant must produce evidence to the satisfaction of the election officials that all taxes have been paid); freedom from disqualification by a prior con-

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[11]Miss Code Ann. 1930, § 2029; Miss Constitution, 1890, § 264.

[12]Estimates of state officers and officials of the Democratic and Republican parties vary from 2,500 to 8,000. Exact figures are not available.

[12]Miss. Constitution, 1890, § 241. This section does not violate the Constitution of the United States. Sproule v. Fredericks, 69 Miss. 898, 11 So. 472 (1892); Williams v. Mississippi, 170 U. S. 213, 42 L. ed. 1012 (1898).

viction of certain crimes;[13] payment of a poll tax;[14] and a literacy requirement.[15]

The great body of our Negro citizenry is made up of the tenant farmer class. The strong tendency of this group of Negroes to drift from one plantation to another from year to year will prevent a tremendous number of them from complying with the residence requirement. Large numbers of Negroes are automatically disqualified from the exercise of the franchise by moving from one county to another to make crops at the first of each year.

Most the Negroes in Mississippi are poverty-stricken. That fact, coupled with the natural improvidence of the race, will lead to default of many in the payment of taxes. Since all taxes must have been paid for the preceding two years before a citizen is qualified to be enrolled as an elector, a large number of Negroes will find themselves ineligible to take part in elections, should they apply for registration. The requirement that the aspiring elector shall have paid a poll tax will lead to still further disqualification among Negro residents, even though the tax is a nominal sum.[16]

In specifying those crimes which would disqualify a citizen from exercise of the privilege of voting, upon conviction, the compilers of the Mississippi Constitution listed those offenses which the irresponsible and impulsive class of uneducated Negroes are most prone to commit. A very considerable number of Negroes would find themselves rendered ineligible for registration in the book of voters by past convictions of these offenses.

The illiteracy of the Negro population of the South is well known. Few have more than the rudiments of education. Wholesale disqualification would follow the imposition of the literacy test, in the event of any general tendency of Negroes to apply for registration. The Mississippi Constitution requires that an elector shall

> "be able to read any section of the constitution of this state; or he shall be able to understand the same when read to him, or give a reasonable interpretation of the same."

The constitution leaves to the choice of the election officials the selection of the section to be interpreted. The most illiterate white man could readily give a clear interpretation of the provision that "The governor shall be at least thirty years of age,"[17] but it would tax the wits of any Negro applicant not educated in law (and lawyers may not serve as jurors) to adequately explain just what is meant

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[13]" . . . bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy. . . ."

[14]Miss. Constitution, 1890, § 243. This section does not violate the Constitution of the United States. Sproule v. Fredericks, 69 Miss. 898, 11 So. 472 (1892); Williams v. Mississippi, 170 U. S. 213, 42 L. ed. 1012 (1898).

[15]See, also, Miss. Constitution, 1890, § 264.

[16]Ordinarily $2.00; never to exceed $3.00. Miss. Constitution, 1890, § 243.

[17]Miss. Constitution, 1890, § 117.

by the provision that "The writ of habeas corpus shall not be suspended,"[18] or that "Ex post facto laws shall not be passed."[19]

The requirement that competent jurors must be registered as voters goes far to rebut any presumption giving rise to a *prima facie* case of exclusion of Negroes from juries by wilful and deliberate discrimination. In Alabama, such a presumption readily obtained, because the statute placed a positive duty on the jury commissioners to place all male citizens not generally disqualified, on the jury lists. There, the duty to make citizens eligible for jury service lies with the officials, and failure to place any eligible citizen on the lists is a breach of the law of that state. The requirement to include is universal. In Mississippi, the initiative lies with the citizen. It is a matter of choice with him whether he will render himself competent as a juror by application for the franchise. Until he sees fit to apply for registration as an elector, he is not eligible to be called for jury service. His failure to apply must of necessity fall upon his own head. The county officials cannot be charged with discriminating against him in the choice of jurors, unless some affirmative form of exclusion from suffrage is shown. It is utterly illogical to presume that a man has been discriminated against and excluded from the exercise of a prerogative, when his own conduct has deprived him of the necessary qualifications. Discrimination is impossible until some situation has arisen which requires the exercise of judgment by officials. No such situation arises in Mississippi until the citizen has applied for registration as an elector.

In Mississippi, all those qualified are not to be placed on the jury lists, as is the case in Alabama. The Mississippi law provides that the board of supervisors, at their first meeting of the year, shall prepare a list of jurors to serve for the ensuing year.[20] This list shall include from two hundred to eight hundred names. In preparing the list, the supervisors are referred to the registration book of qualified voters being admonished to select citizens qualified for jury service by intelligence and character. The names shall be chosen from the several beats of the county, in proportion to population. The function of the board in choosing these prospective jurors is quasi-judicial. The names are to be placed in a sealed box, and withdrawn as needed for jury service.[20] The ratio of Negro electors to white is so small that the probability of any appreciable number being drawn is very remote. Moreover, fair administration of the law will require only that negroes be placed on the jury lists in proportion to the ratio of Negro and white voters. A further limitation is provided by a stipulation to the effect that the supervisors shall exclude those who have served on the regular panel within two years,

[18] Miss. Constitution, 1890, § 21.

[19] Miss. Constitution, 1890, § 16.

[20] Miss. Code Ann. 1930, § 2033. This section does not violate the Constitution of the United States. Dixon v. State, 74 Miss. 271, 20 So. 839 (1896), citing Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 S. Ct. 799 (1896). Miss. Constitution, 1890, § 264.

[21] Miss. Code, Ann. 1930, §§ 2032 and 2033.

except in the event of a shortage of jurors.[21] These restrictions make it highly improbable that negroes will appear for jury service with any degree of regularity.

Those Negroes registered in Mississippi belong principally to the educated and professional classes. A large number of them are postal workers and other Federal employees. The majority belong to one of the following classes, all of which are excused from jury service: officers of the Federal government, physicians, osteopaths, and dentists actually engaged in practice, teachers and officers of public schools, keepers of public mills or ferries, ministers of the gospel, and one employee to each drug store.[22] Persons over sixty years of age may claim the privilege of being excused.[23] This leaves very few of the Negro electors of Mississippi outside the legally excluded groups.

When Negroes are called for jury service, it is to be expected that they will usually ask to be excused. The intelligent Negro who has registered will not antagonize the white people of the community by insisting on jury service.

The Mississippi Supreme Court has shown that it will act as quickly as the Supreme Court of the United States to safeguard the rights of Negroes in this respect. In the case of *Farrow v. State*,[24] that court stated precisely the same principles as did Justice Hughes in the Patterson and Norris cases. It was quick to remand the case for further proceedings in keeping with the defendant's constitutional rights. Yet, at the same session, in *Lewis v. State*,[25] they held that our laws were not discriminatory. The court pointed out that there is no constitutional requirement that a jury be all Negro, all white, or composed of a mixture of Negroes and whites. A conviction should only be reversed on grounds of denial of equal protection of the law in this respect when there has been an affirmative showing of discrimination and exclusion by reason of race and color.

In the absence of the presumption which necessarily arises under the Alabama law, where manhood is the only prerequisite for jury service, this question should present no difficult question to the Mississippi judiciary. According to the holdings of the Supreme Court of the State and those of the Supreme Court of the United States, circuit judges should display judicial courage and honesty in overruling motions to quash indictments or trial venires, when no proof is adduced of discrimination by reason of race or color. With equal readiness, they should grant such motions when there is positive evidence of such exclusion in the cases before them. The presumption that prevailed in the Alabama cases should not be allowed to obtain in Mississippi, because of the very different provisions of the jury laws of the latter state.

J. F. Barbour, Jr.

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[22] Miss. Code, Ann. 1930, § 2031.
[23] Miss. Code, Ann. 1930, § 2032.
[24] 91 Miss. 509, 45 So. 619 (1908).
[25] 91 Miss. 505, 45 So. 360 (1908).

CORPORATIONS—REPORT OF ORGANIZATION— FAILURE TO FILE AS CREATING INDIVIDUAL LIABILITY— MISSISSIPPI CODE ANN. (1930) § 4141.

Chapter one hundred of The Mississippi Code of 1930, after prescribing the method of creating private corporations, proceeds as follows:[1] "Every corporation organized under this chapter shall, within thirty days after such organization, make report thereof to the secretary of state . . . . Should such report be not made within the time required, the charter granted shall be null and void, and all persons doing business thereunder shall be deemed and held to be partners in the business and liable as such."

Early in the history of the law of this country, the distinction was drawn between those statutory requirements regarded as conditions precedent to corporate existence, and those regarded as conditions subsequent. A condition precedent is a necessary step to the process of incorporation, while a condition subsequent is an act which, although required of the individuals seeking to become incorporated, nevertheless is not made prerequisite to the assumption of corporate powers. Non-compliance with the former may be set up collaterally. Non-compliance with the latter may be taken advantage of only in a direct proceeding by the state.[2]

However, this latter rule is an incident of the common law, and follows the ordinary rule of forfeitures. There are numerous cases in which non-compliance with conditions subsequent prescribed by statute has given rise to forfeitures which took place *ipso facto* and were taken advantage of collaterally. This distinction between forfeitures *ipso facto* and forfeitures necessitating action by the state is clearly pointed out by Chief Justice Marshall in the case of *United State v. Grundy and Thomburgh.*[3] He says:[4] "in all forfeitures accruing at common law, nothing vests in the government until some legal step shall be taken for the assertion of its right . . . but the distinction . . . between forfeitures at common law, and those accruing under a statute is certainly a sound one. Where a forfeiture is given by a statute, the rules of the common law may be dispensed with and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend on the construction of the statute."

The courts will not imply, on the part of the legislature, an intention that the failure of a corporation to comply with a condition

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[1] § 4141.

[2] Bayless v. Orne, Bybee et al., Freem. Ch. Rep. 161 (Miss. 1840); Bohannon v. Binns, 31 Miss. 355 (1856); Quinn et al. v. Woods, 134 Miss. 621, 99 So. 510 (1924); Granby Min. & Co. v. Richards, 95 Mo. 106, 8 S. W. 246 (1888); 1 THOMPSON, CORPORATIONS (3rd ed. 1927) 234.

[3] 3 Cranch 337, 2 U. S. 459 (1806).

[4] P. 463.

subsequent shall *ipso facto* dissolve the corporation. Rather it will be presumed that such failure is merely a cause of forfeiture in direct proceedings by the state, if the language of the statute will reasonably admit of such construction.[5] The same rule is applied to statutory forfeiture in general.[6] However, there is little uniformity in the construction of statutes decreeing forfeitures, and no objective standard by which such statutes can be interpreted can be evolved from the mass of conflicting opinions. Although some jurisdictions are inclined to be more liberal than others, nevertheless it is difficult to predict an interpretation in any given court.[7]

Several good reasons have been advanced for the strict construction of statutes decreeing forfeitures. Some courts conclude that such statutes are penal in nature, and for this reason are subject to being waived by the sovereign. From this is deduced the conclusion that the state should be the only one able to take advantage of such

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[5]Achafalaya Bank v. Dawson, 13 La. 497 (1839); New York & L. I. Bridge Co. v. Smith et al., 148 N. Y. 540, 42 N. E. 1088 (1896); BALLANTINE, CORPORATIONS (1927) 789.

[6]United States v. Loomis, 297 Fed. 359 (1924).

[7]In Oakland R. R. Co. v. O. B. & F. V. R. Co., 45 Cal. 365 (1873), "the franchise and privileges herein granted shall utterly cease and be forfeited" was held to *ipso facto* forfeit a street railway's franchise, upon their not completing track within a given time. In Borland v. Lewis, 43 Cal. 569 (1872) (approved and followed in Upham v. Hosking, 62 Cal. 259 (1882)), "such neglect or failure shall work a forfeiture of such lands and the same shall be resold as if no purchase had been made" was held to work a forfeiture *ipso facto*. Likewise, a forfeiture *ipso facto* was held to have taken place, upon non-compliance with the statute, in Los Angeles R. Co. v. Los Angeles, 152 Cal. 242, 92 Pac. 490, 15 L. R. A. (N. S.) 1269, 125 Am. St. Rep. 54 (1907), where the language was "works a forfeiture"; in In re Brooklyn W. & N. Ry. Co., 72 N. Y. 245 (1878), where it was "Its corporate existence and powers shall cease"; in Fontaine v. Phoenix Ins. Co., 11 Johns 293, 5 N. Y. C. L. Rep. 156 (1814) (approved in Kennedy v. Strong, 14 Johns 128, at 131, 5 N. Y. C. L. Rep. 801, at 803 (1817), criticized in Wilkes v. Peoples Fire Insurance Co., 19 N. Y. 184, at 187 (1859)), where it was "shall be forfeited" and in Commonwealth ex rel Attorney General v. Lykens Water Co., 110 Pa. 391, 2 Atl. 63 (1885), where it was "the rights and privileges thereby granted to said corporation shall revert to the commmonwealth." A forfeiture *ipso facto* was declared to have occurred for non-payment of franchise taxes in the case of Kaisar Land and Fruit Co. v. Curry, 155 Cal. 638, 103 Pac. 341 (1909), and a similar decision was rendered in the case of California Nat. Supply Co. v. Flack et al., 183 Cal. 124, 190 Pac. 634 (1920). The doctrine of statutory forfeiture *ipso facto* reached its limit in the case of United States v. Distilled Spirits, 14 Wall. 44, 20 U. S. 815 (1871), where the court held that a forfeiture *ipso facto* for fraudulently seeking to evade a liquor tax defeated the title of an innocent purchaser after the fraudulent removal.

On the other hand, the courts seem to have gone to great lengths to evade the necessity of decreeing a forfeiture *ipso facto* in the case of Achafalaya Bank v. Dawson, 13 La. 497 (1839), where the language of the statute was "shall be ipso facto, forfeited and void"; in New York & L. I. Bridge Co. v. Smith et al., 148 N. Y. 540, 42 N. E. 1088 (1896), where it was "this act and all rights and privileges granted hereby shall be null and void" (The court reasoned that void was often used to mean voidable); in Hornbrook et al. v. Town of Elm Grove, 21 S. E. 851 (W. Va. 1895), where the language was "shall thereby forfeit its charter and all the rights, powers, and privileges conferred thereby"; in Baltimore & O. R. Co. v. Supervisors, etc. of Marshall County, 3 W. Va.

statutes.[8] Other courts are of the opinion that the corporation is entitled to a hearing for the purpose of having a judicial determination as to whether or not there has been compliance with the prescribed conditions.[9] In the case of *Railroad Co. v. Bailey*,[10] the plaintiff corporation brought an action to recover the unpaid balance on its stock sold to the defendant. The latter sought to defeat the action by setting up failure of the plaintiff to comply with a provision in its charter that it must spend twenty thousand dollars within a certain prescribed time. That court held that the legislature would not have denied the corporation the right to collect from its stockholders the twenty thousand dollars it was required to spend.

Since our statute provides for assumption of corporate powers before the expiration of the thirty days allowed for reporting the organization,[11] the conclusion is inescapable that section 4141 is a condition subsequent rather than a condition precedent. Since the statute provides for partnership liability in clear and unmistakable language, failure to file can have but one effect, and our courts have given it that effect by holding that, when the report has not been made as required, those doing business under the void charter can be held liable as partners.[12]

However, there are three other situations which might arise under the statute, and the liability in two of them has never been determined by our courts. The first arises when there is a failure to report the organization within thirty days, and debts are contracted after the expiration of this period, but the report is made before suit is brought. The second arises when debts are contracted before the expiration of the thirty days and then there is a failure to report, or a failure to make a timely report. The third situation arises when the report is made after the expiration of the thirty days, and debts are contracted after the report is made.

The statute has been construed by our courts in four decisions. The liability in the situation first referred to (that in which there is a failure to report within thirty days, and debts are contracted after the expiration of the period, but the report is made before suit is

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323, where it was "this act shall be null and void"; and in Greenbrier Lumber Co. v. Ward, 30 W. Va. 43, 3 S. E. 227 (1887), where it was "shall . . . forfeit its charter to the state."

For *ipso facto* forfeitures in the old common law, see note to United States v. Grundy, 3 Cranch 356, 2 U. S. 466.

[8]Achafalaya Bank v. Dawson, 13 La. 497 (1839); Adler v. Baker-Dodge Theatre Co. et al., 190 Iowa 970, 181 N. W. 254 (1921); Union Trust & Savings Bank of Ames v. Blair-Harper Seed Co. et al., 200 Iowa 374, 202 N. W. 839 (1925); State v. Fourth New Hampshire Turnpike, 15 N. H. 162, 41 Am. Dec. 690, 1 Smith's Cases 370 (1844); ANGELL & AMES, CORPORATIONS (10th ed.) § 777.

[9]Greenbrier Lbr. Co. v. Ward, 30 W. Va. 43, 3 S. E. 227 (1887); BALLANTINE, CORPORATIONS (1927) 789.

[10]24 Vt. 465, 58 Am. Dec. 181 (1852).

[11]MISS. CODE ANN. 1930, § 4131.

[12]See Ragland and McRaven v. Doolittle, 100 Miss. 498, 56 So. 445 (1911); Hessig-Ellis Drug Co. v. Wilkerson et al., 115 Miss. 668, 76 So. 570 (1917).

brought) was settled in the case of *Ragland & McRaven v. Doolittle.*[13] The incorporators, who were also directors and engaged in the business, were held individually liable in that case, in spite of the fact that they made a report about five months after organization. The debts were contracted during the fifth month after organization. Evidence of an attempt to make the report at the proper time was excluded as immaterial. In the case of *Hessig-Ellis Drug Co. v. Wilkerson et al.,*[14] where no report was made before suit, liability was held (two justices dissenting) to extend to a stockholder who had never taken an active part in the business, and who did not acquire his stock until after the expiration of the thirty days allowed for reporting organization.[15] In the case of *Natalbany Lumber Co. v. Countiss et al.,*[16] participation of the appellees in an adjudication of the appellant as a bankrupt corporation was held to render the former bound by a judicial determination of corporate existence implied in the judgment of the master in bankruptcy. This participation, the court held, precluded them from setting up failure to comply with section 4141. The case of *Southern Coal Co. v. Yazoo Ice and Coal Co.,*[17] held constitutional a curative statute extending the time for making the report, and that its effect was to relieve the persons doing business of their personal liability, if they took advantage of such curative act before contracting the debts.

A thorough search of the authorities fails to reveal a solution of the difficulties presented by the second and third situations above referred to. However, a number of principles are set down, from which we may gain some enlightenment.

Adler v. Baker-Dodge Theatre Co. et al.[18] was a case in which the Supreme Court of Iowa interpreted a statute of that state providing for individual liability of the stockholders of any corporation which failed to make publication within three months. The statutes provided that the corporation was authorized to do business upon the filing of articles of incorporation with the Secretary of State. In a dictum,[19] the court said: "For a period of three months the acts of the corporation were valid. For such period the stockholders were not liable. . . . Subsequently the acts of the corporation became invalid and the stockholders became liable."

Section seventeen of the chapter of the Wisconsin code providing for incorporation reads as follows: "Before any corporation, formed and established by virtue of the provisions of this law, shall commence business, the president and directors thereof shall cause their articles of association to be published," etc. Section twenty-three imposes individual liability on the officers or directors of "any such

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[13] 100 Miss. 498, 56 So. 445 (1911).
[14] 115 Miss. 668, 76 So. 570 (1917).
[15] *Cf.* Boughton v. Otis et al., 21 N. Y. 261 (1860), and Bright v. Hutton, 3 House of Lords Cases 341, 10 Eng. Rep. 133, 12 Eng. L. & Eq. 1 (1852).
[16] 134 Miss. 511, 99 So. 262 (1924).
[17] 118 Miss. 860, 80 So. 334 (1919).
[18] 190 Iowa 970, 181 N. W. 254 (1921).
[19] *Id.* at 971.

corporation" if they intentionally neglect to comply with section seventeen. In the case of *Harrod v. Harner*,[20] the plaintiff sought to ignore section twenty-three and hold the stockholders liable on the grounds that a valid corporation had never been formed. The court held that there was a valid corporation, but that the directors were individually liable under section twenty-three for allowing the corporation to commence business. The principle set forth in the Harrod case *supra*—that a corporation may have a valid existence, and yet lack the power to commence business without automatically incurring certain prescribed penalties—is one that is generally recognized. Certain conditions prescribed by statute may be conditions precedent to commencing business.[21]

In the light of these principles, it would seem that our statutes provide for a valid corporate existence until the expiration of the thirty day period, with an attendant right to do business as a corporation during such period, but subject, nevertheless, to a forfeiture *ipso facto* of the corporate privileges. The language of the statute should not be interpreted so as to provide partnership liability in the second situation referred to (that in which debts are contracted before the expiration of the thirty days and then there is a failure to make a report).

From the standpoint of the policy behind the statute and the standpoint of common justice, the statute should not be interpreted so as to provide personal liability in the third situation (that in which the report is made after the expiration of the thirty days, and debts are contracted after the report is made). However, there seems to be no authority for any other interpretation.

Section 4141 first appeared in the Code of 1906, and has appeared in every code since.[22] It has been criticized at least once as being too harsh.[23] Numerous curative acts[24] have been passed extending the time for filing the required report. To the writer, the

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[20]32 Wis. 162 (1873).

[21]Garnett v. Richardson, 35 Ark. 144 (1879) (Questioned in Bank of Midland v. Harris, 114 Ark. 344, 170 S. W. 967 (1914), and in Wesco Supply Co. v. Smith, 134 Ark. 23, 203 S. W. 6 (1918) (The dissenting opinion in the latter case seems to be better reasoned)); Walton v. Oliver, 49 Kan. 107, 30 Pac. 172, 33 Am. St. Rep. 355 (1892); Perkins v. Sanders et al., 56 Miss. 733 (1879); Hurt v. Salisbury et al., 55 Mo. 310 (1874).

But *cf.* Midwest Air Filters Pacific v. Finn, 201 Cal. 587, 258 Pac. 382 (1927).

[22]Miss. Code (1906) § 930; Miss. Code (1917) § 4104; Hemmingway's Code (1927) § 4517.

[23]Roberds, *The New Corporation Act* (1929) 2 Miss. L. J. 179: "It is not clear why the omission to report the organization was originally of such gravity as to justify the penalty of this section and it might well be repealed or its rigor modified."

[24]Miss. Laws 1912, c. 140; Miss. Laws 1920, c. 229; Miss. Laws 1926, c. 255; Miss. Laws 1932, c. 249; Miss. Laws 1934, c. 307; Miss. Code (1917) § 4106; Miss. Code (1921 Supp.) § 4106; Hemmingway's Code (1927) § 4519. These acts were held constitutional in Southern Coal Co. v. Yazoo Ice & Coal Co., 118 Miss. 860, 80 So. 334 (1919).

latter fact alone seems sufficient to indicate a need for a modification or repeal of the section. If the policy of the law is sound, it seems that the chapter of the code dealing with incorporations should be amended so that the filing of the report would become a condition precedent to the corporation's doing business with anyone except its own stockholders.[25]

THOMAS Y. MINNIECE.

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[25]See: ARK. DIG. STAT. (Crawford & Moses, 1921) § 1711; FLA. COMP. LAWS (1927) §§ 5981 and 5983; and CARROLL'S KY. STATUTES (Baldwin's 1930 Revision) § 543.

RECENT IMPORTANT DECISIONS

CRIMINAL LAW—LIABILITY OF CONSPIRATORS FOR ACTS OF CO-CONSPIRATORS.

Blount, non-union guard for a mill, was waylaid by defendant and five other union employees who were on strike. Defendant and another threatened Blount with their pistols, ordering the others to take Blount's pistol from him. It was taken by an unidentified conspirator, and never returned. Blount was beaten and warned to quit his job and leave town. Defendant, after obtaining a severance, was convicted of robbing Blount of his pistol, valued at $35.00. HELD: Affirmed. Since robbery was a natural and probable consequence of the common and unlawful purpose, defendant is coequally liable with the other conspirators for the stealing of the pistol by an unknown, even though evidence showed that none of the parties intended at the outset to commit that particular crime. *Odom v. State,* 172 Miss. 687, 161 So. 141 (1935).

It would seem that the doctrine applied in this case embodies a rather severe application of the rules pertaining to the liability of a conspirator for acts of a co-conspirator,[1] which, in effect, are: (1) If two or more persons engage in a confederation for the purpose of jointly committing an unlawful act, any act done by any one of them in pursuance of the original object is, in the regard of law, the act of all;[2] (2) If the crime committed by any one of the conspirators was the natural and probable consequence of the common purpose, then all of the confederates are liable, even though the evidence shows, as in the case at hand, that none of the parties intended at the beginning to commit that particular crime.[3]

Nevertheless, if the act was the fresh and independent product of the mind of one of the conspirators, outside of or foreign to the common, unlawful purpose, and not in furtherance thereof, the individual wrongdoer is alone re-

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[1]For brief, concise history of the crime, see Sayre, *Criminal Conspiracy* (1921), 35 HARV. L. REV. 393; see, also, Blair, *The Judge-Made Law of Conspiracy* (1903), 37 AM. L. REV. 33; 12 C. J., §§ 1, 2, 3; 1 BISHOP, CRIMINAL LAW, § 641.

[2]Lusk v. State, 54 Miss. 845, 2 So. 256 (1887); Lamar v. State, 63 Miss. 265 (1885); Lyon v. State, 129 Miss. 463, 92 So. 582 (1922); Pickett v. State, 139 Miss. 529, 104 So. 358 (1925); 1 BISHOP, CRIMINAL LAW, §§ 629, 630; 2 WHARTON, CRIMINAL LAW, § 1672; Tucker v. State, 100 Fla. 1440, 131 So. 327 (1930); Amos v. State, 83 Ala. 1, 3 So. 749, 3 Am. St. Rep. 682 (1888); Aplin v. State, 19 Ala. App. 604, 99 So. 734 (1924); Earnest v. State, 21 Ala. App. 534, 109 So. 613 (1926).

[3]Peden v. State, 61 Miss. 267 (1883), holding that, if, in carrying out conspiracy to flog a man, one of the conspirators kills him, the others are equally guilty of murder; Woodward v. State, 166 Miss. 596, 143 So. 859 (1932) (murder resulting from burglary); Lusk v. State, 54 Miss. 845, 2 So. 256 (1887) (arson from physical violence in victim's home); see, also, Huggins v. State, 149 Miss. 280, 115 So. 213 (1932); Martin v. State, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91 (1890); Ferguson v. State, 134 Ala. 63, 32 So. 760, 92 Am. St. Rep. 17 (1902); Gibson v. State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96 (1890); see 2 WHARTON, CRIMINAL LAW, § 1672.

sponsible therefor.[4] More concisely, if the act sprang from the individual malice of one particular conspirator and is distinct from the collective, unlawful purpose, then the other conspirators are not in law deemed guilty thereof, and the culpability therefor is placed solely upon the perpetrator. The court, in the case under discussion, seemed to have had no hesitation in discarding this theory of the stealing of the pistol.

The Supreme Court of Mississippi cited two cases in support of its holding in *Odom v. State.* In one, *Lusk v. State,*[5] defendant and two others attacked and abused a man and his wife in the latters' home, and, after the owners had been driven out, neighbors saw that the house was on fire. There was no proof whatever of the purpose of the attack, as there was in the Odom case. The jury in *Lusk v. State* could therefore be allowed more latitude in inferring a purpose and its natural result, and in enlarging each conspirator's liability. *A priori,* it would seem that the more evident the common purpose is, the less scope is permissible in determining a natural result thereof.

In the other case cited, *Woodward v. State,*[6] the defendant and another entered deceased's combined store and home for the purpose of committing larceny. They knew the proprietor was present and that he might possibly interfere, and, in view of such facts, they were properly deemed to be responsible for any violence toward him in furtherance of their unlawful design. However, in the instant case, the Court held, in effect, that whether or not the act was the natural and probable result of the original, unlawful purpose is a question for the jury,[7] and, in the absence of reversible error, a stringent application of the rules as to a conspirator's liability would not be reversed. It will be interesting to know how far the court will go in the future on such a principle, which, it is submitted, will frequently not give full consideration to the defendant's rights.

There are two qualifications, important but, perforce, indistinctly outlined, of the general rules discussed herein, and it might well be asked whether or not one of them applies to the case under discussion. They are:

1. "The act must be the ordinary and probable effect of the wrongful act specifically agreed upon, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design."[8] In the words

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[4]McLeroy v. State, 120 Ala. 274, 25 So. 247 (1889); Meyers v. State, 43 Fla. 500, 31 So. 275 (1901); Alaton v. State, 109 Ala. 51, 20 So. 81 (1896); Tucker v. State, 100 Fla. 1440, 131 So. 327 (1930); see 1 BISHOP, CRIMINAL LAW, § 641; *cf.* Lusk v. State, 54 Miss. 845, 2 So. 256 (1887); Huggins v. State, 149 Miss. 280, 115 So. 213 (1932).

[5]54 Miss. 845, 2 So. 256 (1887), in which Campbell, C. J., aptly but briefly expounds the common-purpose and individual-malice rules, but omits citing any precedents.

[6]166 Miss. 596, 143 So. 859 (1932).

[7]Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898 (subsequent concurring opinion by one justice), 3 Am. St. Rep. 320 (1887); Huggins v. State, 149 Miss. 280, 115 So. 213 (1932); McLeroy v. State, 25 So. 247, 120 Ala. 274 (1889); Morris v. State, 146 Ala. 66, 41 So. 274 (1906) (collecting many authorities).

[8]5 R. C. L., § 4; Williams v. State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133 (1887); Meyers v. State, 43 Fla. 500, 31 So. 275 (1901); 1 BISHOP, CRIMINAL LAW, § 641; Peden v. State, 61 Miss. 267 (1883); Ferguson v. State, 134 Ala.

of the court in the instant case, "the disarming of Blount was the natural and necessary thing to be done in order for the conspirators to accomplish their unlawful purpose; in other words, the robbery was the reasonable outgrowth of their unlawful purpose." This apparently means that the stealing of Blount's pistol was the natural result of disarming him to prevent being shot, which, it is submitted, is a doubtful deduction. Generally speaking, an examination of numerous cases anent this qualification will manifest the fact that the question whether or not a given act is the reasonable outgrowth of the collective, unlawful purpose embraces an inevitably broad field of social and legal concepts, and, as in the instant case, the rules are sufficiently flexible to allow the jury an ill-defined jurisdiction.

2. If the act was in furtherance of the common, unlawful purpose, it is held almost without exception that said act was the natural and probable consequence of the said unlawful purpose.[9] Palpably, this qualification simply shifts its method of rationalizing the defendant's guilt, but, although it is of necessity more restricted in its application and more rare in its occurrence, it is also more easily comprehended and more definitely conclusive when once established. In the case under discussion, the court seemingly paid little attention to this qualification as applied to the stealing of the pistol, but preferred to base its holding on the idea that the robbery was the natural and probable result of the collective, unlawful object.

To make one liable for murder committed by a co-conspirator after robbery of a store, it has been held that it must have been the joint enterprise of the parties not only to mutually assist one another in committing the major, unlawful purpose, but also the design should extend to and include a common intention to resist arrest with great violence or to kill deceased or any other person who interfered with the escape.[10] Of course it is generally held that this joint enterprise or purpose may be proved either by the acts of the parties or by circumstances, as well as by their agreement.[11]

63, 32 So. 760, 92 Am. St. Rep. 17 (1902). *Quaere*: Was the act part of the original design; was it contemplated by the conspirators; was it in furtherance of the purpose; was it a natural and legitimate consequence thereof?

[9]Osborne v. State, 99 Miss. 410, 55 So. 52 (1911); Street v. State, 43 Miss. 2 (1870); Lynes v. State, 36 Miss. 617 (1859); Oldham v. State, ... Ala. ..., 161 So. 546, cert. denied (Sup.) 161 So. 548 (1935); Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392 (1877); Link v. State, 64 Miss. 845, 2 So. 256 (1887); Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320 (1887), cited, *supra*, note 7; Tolbert v. State, 71 Miss. 179, 14 So. 462, 42 Am. St. Rep. 452 (1893).

[10]Huggins v. State, 149 Miss. 280, 115 So. 213, 214 (1928), citing with approval People v. Marwig, 227 N. Y. 382, 125 N. E. 535, 22 A. L. R. 845 (1919); see, also, Rex v. Collison, 4 Carrington and Payne 565 (1831).

[11]Street v. State, 43 Miss. 2 (1870); admissions of confederate must have been made during prosecution of crime; but see Osborne v. State, 99 Miss. 410, 55 So. 52 (1911), for qualification thereof; 1 WHARTON, CRIMINAL LAW, § 1673; see, also, 1 WHARTON, CRIMINAL LAW, § 698 *et seq.* where the cases are given in detail; Lynes v. Street, 36 Miss. 617 (1859) (on admissibility of conspirator's testimony).

In addition, it is immaterial that the confederate who perpetrated the individual act cannot be identified.[12] Moreover, when one enters a conspiracy to do an unlawful act, he becomes a party to every act which has been previously done by his co-conspirators in furtherance of the common design.[13]

There have been surprisingly few Mississippi cases applying the rules discussed herein, and those apposite to the point at issue have been cited. This state's changing, increasingly complicated social structure will indubitably produce within the near future numerous conflicts with labor agitators and with bands of organized criminals. Significantly, the affirmance of the jury's verdict in the instant case predicts a strong application in Mississippi of the rules of liability regarding conspirators. In the ultimate analysis, such a course will likely prove to be a salutary preventive of a plethora of unlawful confederation.[14]

WILLIAM ETHRIDGE, JR.

TORTS—CONCURRENT NEGLIGENCE—PROXIMATE CAUSE.

Defendant railroad company was held liable by the trial court for death of plaintiff's intestate at a grade crossing when defendant's train struck the school bus in which deceased was riding. The driver of the bus had stopped just before driving on the track, but did not see the train. Upon conflicting evidence the jury found that the statutory warning signals were sounded, but not continuously, as required by statute. HELD: Affirmed. Before reviewing court can interfere with a jury verdict, the testimony must so strongly preponderate that the court can safely say that it was overwhelmingly in favor of the appellant. *Miss. Cent. Ry. Co. v. Roberts,* ....Miss....., 160 So. 604 (1935).

The death of the deceased, for which this action is brought, occurred when the driver of the school truck drove upon the track before the train of the defendant. The evidence was uncontroverted that the driver stopped the bus before going upon the track, and the court found that "his stop and gesture of looking and listening was only a gesture pro forma." The evidence was contradictory as to whether the statutory warning signals were sounded continuously, or only intermittently, but the jury found that they were sounded only intermittently. The court refused to set aside the verdict, which found the driver and the railroad concurrently liable, and fixed a joint sum as damages.

The precepts the court lays down in reaching its conclusion are fundamentally sound, and as such no fault can be found with them. It is only the application of these principles which is subject to criticism. One of these precepts is: A finding of fact by the jury will not be reversed by an appellate court merely because, in the opinion of the court, the evidence preponderates in favor of the opposite conclusion, but only in case the evidence is deemed by the appellate court to be overwhelmingly in favor of the appellant.[1] The other

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[12]Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320 (1889) cited *supra,* notes 7, 9 (citing many authorities).

[13]Eaton v. State, 8 Ala. App. 136, 63 So. 41 (1913); Jenkins et al. v. State, 35 Fla. 737, 18 So. 182 (1895); Jones v. State, 174 Ala. 53, 51 So. 31 (1911); see also, Pickett v. State, 139 Miss. 529, 104 So. 358 (1925).

[14]See HOLMES, COMMON LAW, 42-49.

[1]Gulf & S. I. Ry. Co. v. Simmons, 150 Miss. 506, 117 So. 345 (1928).

is: A passenger is not chargeable with the negligence of the driver of a vehicle who is not under the control of the passenger, unless the passenger saw the danger from which the injury resulted, and having time to remonstrate or escape, failed to do either.[2] But an investigation of the authorities leads to the conclusion that the court failed to take into consideration several points.

The verdict of the jury was for $9,500 against the railroad and bus driver jointly. Only the railroad appealed. Its argument is as follows: The railroad is entitled to a reversal upon the point that the negligence of the bus driver was the sole proximate cause of the injury. Although the bell was not continuously rung, the train was within full view and within 300 feet of the bus driver when he stopped and looked, and having looked, he cannot be heard to say that he did not see the approaching train.[3] Since in law he saw the train and thus knew of its near approach, the action of the bus driver in moving forward to a collision with the train was the voluntary, intervening act of an independent agent which had the effect to insulate the negligence of the railroad and to make that negligence the remote cause and the negligence of the bus driver the proximate cause. This logical argument is as yet unanswered by the Supreme Court, except by the statement, quoted above, that "his stop and gesture of looking and listening was only a gesture pro forma," which of itself, seems to be sufficient to brand the bus driver with the negligent act which was the proximate cause of the accident.

The plaintiff seeks to charge the driver with liability by joining him with the railroad as defendant in this action. To sustain the verdict rendered by the trial court, there must have been a finding of concurrent negligence on the part of both defendants. If so, it must be true that the acts of both are the proximate causes of the injury. Therefore, the question seems logically to resolve itself into this: Were the bus driver and the railroad guilty of concurrent negligence? The decision of the court is to the effect that they were.

The only negligence with which the railroad is sought to be charged consists of not sounding the statutory warning signals *continuously,* as provided by statute.[4] This was a question of fact, and was properly left to the jury.[5] But mere failure to give the required statutory signals will not necessarily warrant a recovery by a person injured.[6] There was uncontradicted testimony to the effect that the warning signals were sounded at least *intermittently.* It is the duty of the railway to exercise such care in regard to signals, speed, and lookouts as might be expected of ordinarily prudent persons engaged in operating a railroad under like circumstances, and it is the duty of the traveller to use such care as might usually be expected of an ordinarily prudent person

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[2] Y. & M. V. Ry. Co. v. Beasley, 158 Miss. 370, 130 So. 499 (1930).

[3] The appellant here cites 1 MOORE, FACTS 204-6.

[4] MISS. CODE ANN. 1930, § 6125.

[5] 2 THOMPSON, NEGLIGENCE, § 1671; Y. & M. V. Ry. Co. v. Lucken, 137 Miss. 572, 102 So. 393 (1925); C. & G. Ry. Co. v. Lee, 149 Miss. 534, 115 So. 782 (1928); Y. & M. V. Ry. Co. v. Beasley, 158 Miss. 370, 130 So. 499 (1930); Gulf etc. Ry. Co. v. Carlson, 137 Miss. 613, 102 So. 168 (1924).

[6] Brown v. Chicago & N. W. Ry. Co., 109 Wis. 384, 85 N. W. 271 (1901); 2 THOMPSON, NEGLIGENCE, § 1606.

situated as he is to learn of the approach of the train.[7] Viewed in the light of these decisions, there seems to be no ground on which the defendant can be held liable.

Was the driver exercising the care of an ordinarily prudent man? He stopped within twenty-six feet of the railway, and pretended to look for the train. The court states in the opinion that the gesture of stopping and looking "was only a gesture pro forma." This is certainly not the care of an ordinarily prudent man.

But the court holds that the negligence of the bus driver cannot be imputed to the deceased. The authorities cited above sustain this position. But does such fact create a liability on the part of the railroad where none previously existed? Does it not rather create a liability on the part of the bus driver? It seems to be the argument of the court that since the negligence of the driver cannot be imputed to the deceased, that therefore the railroad is liable, in spite of the fact that the only negligence of which the railroad was guilty was the failure to sound the statutory signals *continuously*. The plaintiff can have his remedy, if at all, only against the party whose negligence was the proximate cause of the injury, who here appears to be the bus driver.

The jury apparently found the bus driver and the railroad guilty of concurrent negligence. Where a person is held to be guilty of concurrent negligence, it must appear that such person was responsible for one of the causes which resulted in the injury.[8] Thus the question seems to resolve itself into that of which of the parties was guilty of the proximate cause of the injury.[9] The verdict of the jury, in view of the facts, seems, however, to be contrary to the great weight of the evidence as to proximate cause, and the position taken by the defendant to be imminently correct. The concurrent negligence of another cannot transform the remote into the proximate cause of the injury, or create or increase the liability of another.[10]

"There can be no recovery of damages where the negligence of the traveller contributed proximately to the injury, although the railroad was also guilty of negligence."[11] There appears to be no reason why the same rule should not be applied where the negligence of a third party contributed proximately to the injury, as is apparently the case here.

"What is termed as the 'last clear chance doctrine' is the doctrine to the effect that in cases of contributory negligence, he who had the last clear opportunity to avoid inflicting an injury is responsible if in the exercise of ordinary care he fails to do so."[12] This doctrine seems to be applicable to the instant case. It must always be remembered that the railroad is operating a

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[7]L. & N. R. Co. v. Cummins' Adm'r., 111 Ky. 333, 23 Ky. L. Rep. 681, 63 S. W. 594 (1901); Cincinnati etc. Ry. Co. v. Champ, 31 Ky. L. Rep. 1054, 104 S. W. 988 (1907); Chesapeake etc. Ry. Co. v. Riddle, 24 Ky. L. Rep. 1687, 72 S. W. 22 (1903).

[8]Searles v. Manhattan Ry. Co., 101 N. Y. 661, 5 N. E. 66 (1886); Cordelia v. Dwyer, 9 Misc. (N. Y.) 399, 29 N. Y. Supp. 1073 (1894).

[9]Chicago City Ry. Co. v. O'Donnell, 207 Ill. 478, 69 N. E. 882 (1904).

[10]Cole v. German Sav. etc. Soc., 124 Fed. 113, 59 C. C. R. 593, 63 L. R. A. 415 (1903).

[11]2 THOMPSON, NEGLIGENCE, § 1605.

[12]Lambert v. So. Pac. Ry. Co., 146 Cal. 231, 79 Pac. 873 (1905). See also: 3 WORDS & PHRASES (2nd series) 27-28.

heavy, cumbersome machine; one which is of necessity fast-moving and slow to stop. It is entitled to the right-of-way. It is the duty of all travellers to use due care in crossing the tracks.[13] There appears to be no reason why, seeing the driver stop his bus at the crossing, the engineer was not justified in believing that he saw the train and intended to wait until it had passed before crossing. Apparently, the last clear chance of avoiding the injury rested, not with the railroad, but with the driver of the bus. Is the railroad, when free of negligence on which a recovery can be founded, to be held liable for the death resulting from the negligence of the bus driver, merely because such negligence cannot be imputed to the deceased?

The bus driver testified that although he stopped, that his vision was obstructed by a stack of cross-ties so near the railroad track that they cut off his view of the approaching train. In regard to that contention, the court makes the following statement: "The evidence shows the presence of the cross-ties and that they did interfere with a view *unless the view were carefully taken with some deliberation* to see an approaching train, but the proof strongly preponderates that the ties did not entirely cut off the view and would not prevent the bus driver from seeing the approaching train had he carefully and deliberately looked, taking sufficient time to do so well." That would seem to dispose of the question. But, further, it has been held that where the view of the track is obstructed, the traveller is held to a higher degree of care in making the crossing, as the obstruction of the view is sufficient to put an ordinarily prudent man particularly on his guard for danger.[14]

If the approaching train might have been seen had the traveller looked, or heard had he listened, his failure to look and listen makes him presumptively negligent, so that if this presumption is not repelled, no recovery of damages can be had.[15] If the driver of the bus were the one for whose injury this action was brought, could it be said that the presumption of negligence on his part had been repelled? The question must certainly be answered in the negative. Can the railroad, then, be held liable for the death of the passenger, the facts being identical? Any recovery from the railroad must be based on its own negligence. If it could not be held negligent had the action been for injuries to the driver, it is difficult to see how it can be held negligent in an action for the death of the passenger. As stated above, any recovery must be based on the fact that the negligence of the defendant was the proximate cause of the injury. If it is not the proximate cause of the injury to the driver, can it be the proximate cause of the injury to the passenger?

After he had stopped and then started again, was it too late to stop when the approaching train was seen? Certainly not; for the bus must have been travelling slowly because of its recent stop, which, according to the evidence, was twenty-six feet from the nearest rail. The bus surely could not have gained much momentum or speed within those twenty-six feet. There may be

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[13] 2 THOMPSON, NEGLIGENCE, § 1185. See also: So. Ry. Co. v. Torian, 95 Va. 453, 28 S. E. 569 (1897); Warner v. N. Y. etc. Ry. Co., 44 N. Y. 465 (1891); Ohio etc. Ry. Co. v. Walker, 113 Ind. 196, 15 N. E. 294 (1888).

[14] 2 THOMPSON, NEGLIGENCE, § 1670. Louisville etc. Ry. Co. v. French, 69 Miss. 121, 12 So. 338 (1891); Cincinnati etc. Ry. Co. v. Howard, 124 Ind. 280, 24 N. E. 892, 8 L. R. A. 593 (1890); Memphis etc. Ry. Co. v. Martin, 117 Ala. 367, 23 So. 231 (1898).

[15] 78 Me. 346, 5 Atl. 771 (1886).

more than one proximate cause of an injury.[16] If, however, it can be said, as it appears, that there was only one proximate cause of the injury in this case, and that that was the negligence of the bus driver, on what theory can the railroad be held liable, even though, as stated above, the negligence of the driver cannot be imputed to the deceased? If the driver's negligence was the sole proximate cause of the injury, the situation is just as if the driver had run his bus into some stationary object, or into the road ditch, and the deceased met her death thereby. How can the railroad, when not guilty of the proximate cause of the accident be held liable in any measure even though the negligence of the bus driver cannot be imputed to the deceased? Could the railroad be held liable if the driver had, by his own negligence, driven his bus into the depot, and the deceased met her death from the accident?

In a case decided not six months after this case, the opinion being written by the author of the opinion in the instant case, the Mississippi Supreme Court takes a very different stand on the sounding of the statutory signals. In that case[17] the plaintiff ran his car into a flat car of the defendant, which at that time a locomotive of the defendant was pushing across a spur track at a grade crossing. The accident took place at night. The plaintiff based his action on the failure of the defendant to sound the warning signals continuously. The court held as follows: "Since the entire crossing was occupied by the railroad cars and had been for a sufficient length of time for a person to see them and to stop before colliding therewith, the said presence of the cars was all the warning thereof that was required, and thereupon the statutory warning by bell and whistle became relegated to the position of actual and legal remoteness, with the result that the failure to give the statutory signals became the remote, and not the proximate, cause, and that the negligence of the plaintiff was the sole proximate cause of the collision, as was held by the learned trial judge." This language justifies the inevitable conclusion that the court means to say that where the train is clearly visible and should have been seen by the traveller, regardless of the sounding of warning signals, that the failure to sound such signals will not justify a recovery.

This language, therefore, is applicable to the instant case, for here, the train was clearly visible to the driver for a distance of three hundred feet, yet he drove onto the track before it. The railroad is found guilty of negligence solely because the bell was not rung *continuously*. The reasoning in the more recent case appears to be much more logical.

However, in support of the decision, we have the following propositions of law: First, where the negligence of two parties has contributed to an injury, it is a question for the jury to say whether it was the negligence of the one or of the other that was the proximate cause of the injury.[18] Second, the question of the use of due care, when the way is obstructed, is for the jury.[19] The court, as we have seen, was correct in holding that a finding of fact by the jury will not be reversed by the appellate court unless it appears that the evidence is overwhelmingly in favor of the contrary conclusion. This case, therefore, appears to be a hard one, in which the hands of the appellate court

[16] C. & C. Ry. Co. v. Lee, 149 Miss. 534, 115 So. 782 (1928).
[17] Spilman v. Gulf & S. I. Ry. Co., ...Miss....., 163 So. 445 (1935).
[18] Chicago City Ry. Co. v. O'Donnell, 207 Ill. 478, 69 N. E. 882 (1904).
[19] 2 THOMPSON, NEGLIGENCE, § 1671.

were bound. The conclusion must be that the jury was either improperly or insufficiently guided by instructions, or that it chose to disregard the instructions.

WILLIAM A. STIGLER.

MASTER AND SERVANT—LIABILITY OF MASTER FOR NOT PROVIDING THE SERVANT A SAFE PLACE IN WHICH TO WORK.

The plaintiff, an employee of the defendant, operated a rock-crushing machine in a small cab ten feet square. The process liberated silica dust into the air. The plaintiff became tubercular from breathing the dust and filed suit against the master. The defendant gave no warning of the danger involved and provided no appliance for the protection of the plaintiff. HELD: The defendant was liable for not using reasonable care to provide his employee a safe place in which to work. Allen Gravel Co. v. Curtis, ...Miss....., 160 So. 670 (1935).

The fact that there was danger in the work done by the plaintiff, and that plaintiff was injured, is not enough in itself to make the master liable. Some negligence on the part of the master in regard to that danger must be shown.[1] There can be no negligence without a breach of duty. The question now arises: What duty owed to the servant did the master breach?

The master owes the servant the duty of using reasonable care to provide a reasonably safe place to work.[2] If the premises cannot be made safe, the master may fulfill his duty by warning the servant of the conditions,[3] or by providing reasonably safe appliances for his protection.[4]

In the instant case, the testimony was to the effect that there was a simple appliance called a respirator which, if furnished to the employees and used by them, would prevent their breathing the dust. It was shown that this devise

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[1]Christopher's Admr's. v. Blanton Store Co., Inc., 258 Ky. 587, 80 S. W. (2nd) 590 (1935).

[2]Anderson v. McGrew, 154 Miss. 291, 122 So. 492 (1929); Goodyear Yellow Pine Co. v. Mitchell, 168 Miss. 152, 149 So. 792 (1933); Barron Motor Co. v. Bass, 168 Miss. 152, 150 So. 202 (1933); Newell Contracting Co. v. Flynt, ...Miss....., 161 So. 298 (1935).

[3]In 3 LABATT, MASTER & SERVANT §§ 2566-67, it is said: "All that a servant can require is that he shall not be exposed to unknown risks." See also: Gunard v. Knapp-Stout & Co., 95 Wis. 482, 70 N. W. 671 (1897); Osborn v. Lehigh Valley Coal Co., 97 Wis. 27, 71 N. W. 814 (1897) and Anthony v. Leeret, 105 N. Y. 591, 12 N. E. 561 (1887).

In Combs v. New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506 (1869), it was said that the basis of the cited doctrine is that the servant's knowledge of the risk prevents the implication of a contract on the part of the master to provide safe conditions.

> "The doctrine applied in the older English cases and in all the American cases up to the present time (Ed. note—1913), with a few possible unimportant exceptions, is that, in the case of all adult servants except seamen, the action must be declared not maintainable, as a matter of law, if the evidence leaves no reasonable doubt that the servant comprehended the abnormal risk which caused his injury." 3 LABATT, MASTER & SERVANT § 2391.

[4]Kehler v. Schwenk, 144 Pa. 348, 22 Atl. 910 (1891); Bohn v. Chicago R. I. & P. R. Co., 106 Mo. 429, 17 S. W. 580 (1891); King v. Ford River Lumber Co., 93 Mich. 172, 53 N. W. 10 (1892); Davis v. Augusta Factory, 92 Ga. 712, 18 S. E. 974 (1893).

was used at other points, but was not used in the plant owned by the defendant. Thus the question of whether or not the defendant was liable for not providing that or another safety device became one for the jury.[5]

A failure on the part of the master to furnish appliances necessary for the protection of the servant is negligence.[6] However, these appliances need not be the latest, most improved, or best,[7] but must be reasonably safe.[8]

To sustain the contention of the defendant that the evidence was not sufficient to sustain the verdict, it was argued that the plaintiff and the defendant had equal opportunities to know and judge the effect of the dust on the lungs.

The great weight of authority is against such a contention. An ordinary laborer is not presumed to have knowledge of a scientific fact.[9] On the other hand, the master is bound to know and take into account the properties of such substances as he employs in his business, and the operation of familiar physical laws on them.[10]

The negligence of the master in this case prevents any question of assumption of risk from arising. Our statute[11] provides that an employee

> "shall not be held to have assumed the risks of his employment in any case where such injury or death results in whole or in part from the negligence of the master."

This has been construed to mean that if there is any negligence on the part of the master, the doctrine of assumption of risk will not apply.[12] The result insofar as we are now concerned[13] is that the doctrine of assumption of risk

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[5]Dalese Bros. Co. v. Kohl, 203 Fed. 627, 122 C. C. A. 23 (1913); Johnson v. Corn products Refining Co., 157 Iowa 420, 138 N. W. 516 (1912); Producer's Oil Co. v. Eaton, 44 Okla. 55, 143 Pac. 9 (1914); Heath v. Calkins, 157 Mich. 288, 122 N. W. 84 (1909); Bailey v. Meadown Co., 154 N. C. 71, 69 S. E. 746 (1910).

[6]Broadfoot v. Shreveport Cotton Oil Co., 111 La. 467, 35 So. 643 (1913).

[7]Kent v. Yazoo & M. V. R. Co., 77 Miss 494, 27 So. 620, 78 Am. St. Rep. 534 (1900).

[8]Hope v. Natchez, C. & M. R. Co., 98 Miss. 822, 54 So. 369 (1911); Godley v. Hines, 123 Miss. 560, 86 So. 289 (1920).

[9]In the following cases ordinary laborers were held not to be charged with knowledge of scientific facts:

Smith v. Peninsular Car Works, 60 Mich. 501, 27 N. W. 662, 1 Am. St. Rep. 542 (1886), (Molten iron on ice and water). McGowan v. La Plata Min. & Smelting Co., 3 McCrary 393, 9 Fed. 861 (1882), (Hot slag and water). Hall v. United States Radiator Co., 52 App. Div. 90, 64 N. Y. Supp. 1002 (1900), (Molten metal with rust). Fox v. Peninsular White Lead & Color Works, 84 Mich. 676, 48 N. W. 203 (1891), (Fumes of Paris Green). Alton Lime & Cement Co. v. Calvey, 47 Ill. App. 343 (1892), (Danger of unexploded dynamite in rocks). Texas & N. O. R. Co. v. Gardner, 29 Tex. Civ. App. 90, 69 S. W. 217 (1902), (Poison cleaning fluid). Adams v. Grand Rapids Refrigerator Co., 160 Mich. 590, 125 N. W. 724, 27 L. R. A. (N. S.) 953 (1910), (Molten enamel in water).

[10]3 LABATT, MASTER & SERVANT § 2751 and notes; see also Wagner v. H. W. Jayne Chemical Co., 147 Pa. 475, 23 Atl. 772, 30 Am. St. Rep. 745 (1892).

[11]MISSISSIPPI CODE ANN. 1930 § 513.

[12]Sea Food Co. v. Alves, 117 Miss. 1, 77 So. 857 (1918); Durr v. Homochitto Lumber Co., 137 Miss. 442, 102 So. 257 (1925).

[13]The case of conductors or locomotive engineers, in charge of dangerous or unsafe cars or engines voluntarily operated by them, is not considered in this discussion. They are expressly made an exception by the statute. See MISSISSIPPI CODE Ann., 1930, § 513, cited in note 12, *supra,* and annotations.

is entirely abolished, for if there is no negligence on the part of the master, he will not be held liable in any event[14] and the doctrine will have no application. If, on the other hand, the master is negligent, the doctrine of assumption of risk will not apply under the construction of the statute.

CHARLES GALLOWAY.

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[14]Christopher's Admr's. v. Blanton Store Co., Inc., 258 Ky. 587, 80 S. W. (2nd) 590 (1935), cited in note 2, *supra;* New Orleans & N. E. R. Co. v. Penton, 135 Miss. 571, 100 So. 521 (1924); Seifferman v. Leach, 161 Miss. 853, 138 So. 563 (1932); Hammon-tree v. Cobb Const. Co., 152 So. 279 (1934); Gulfport Creosoting Co. v. White, 157 So. 86 (1934).

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